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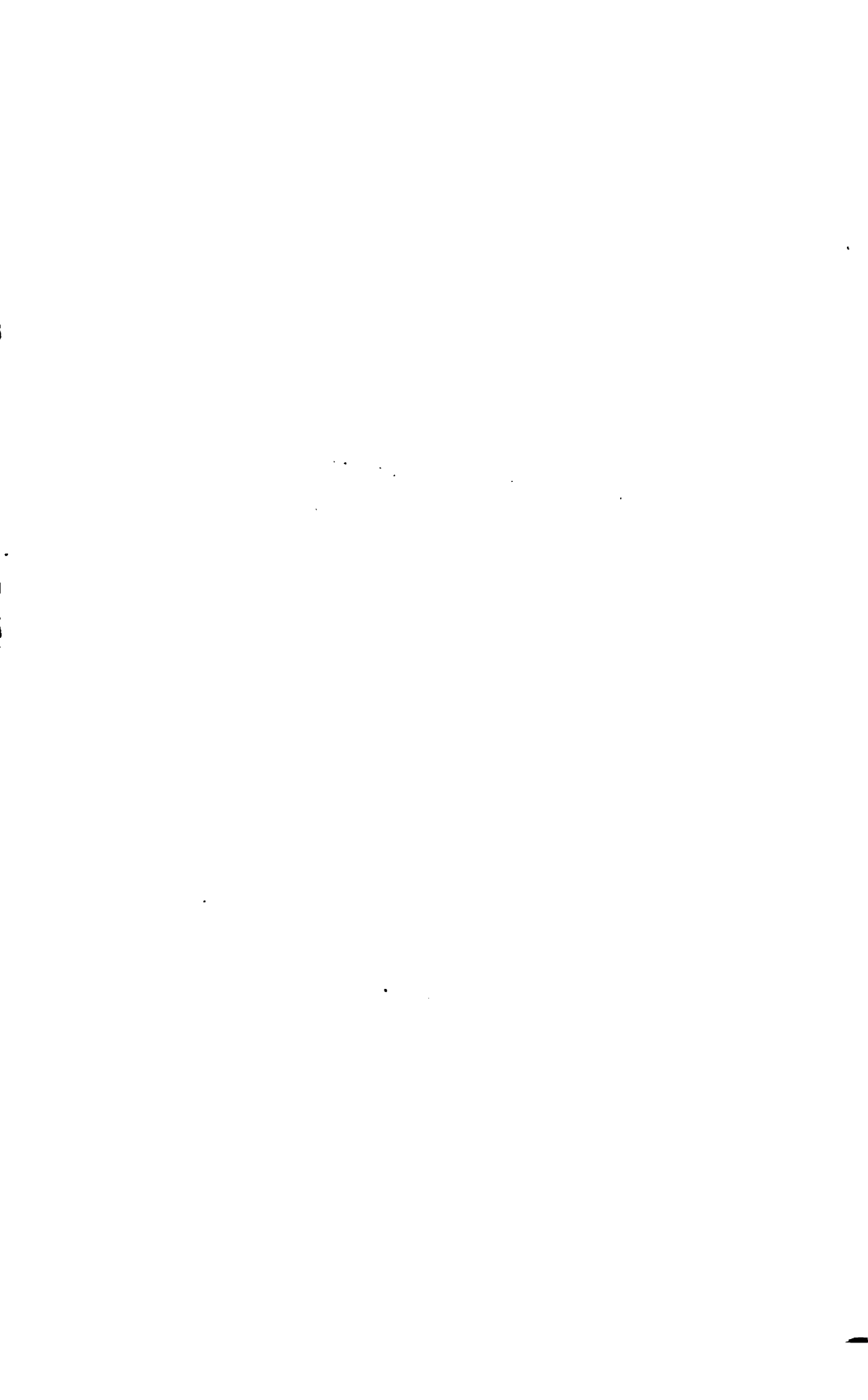
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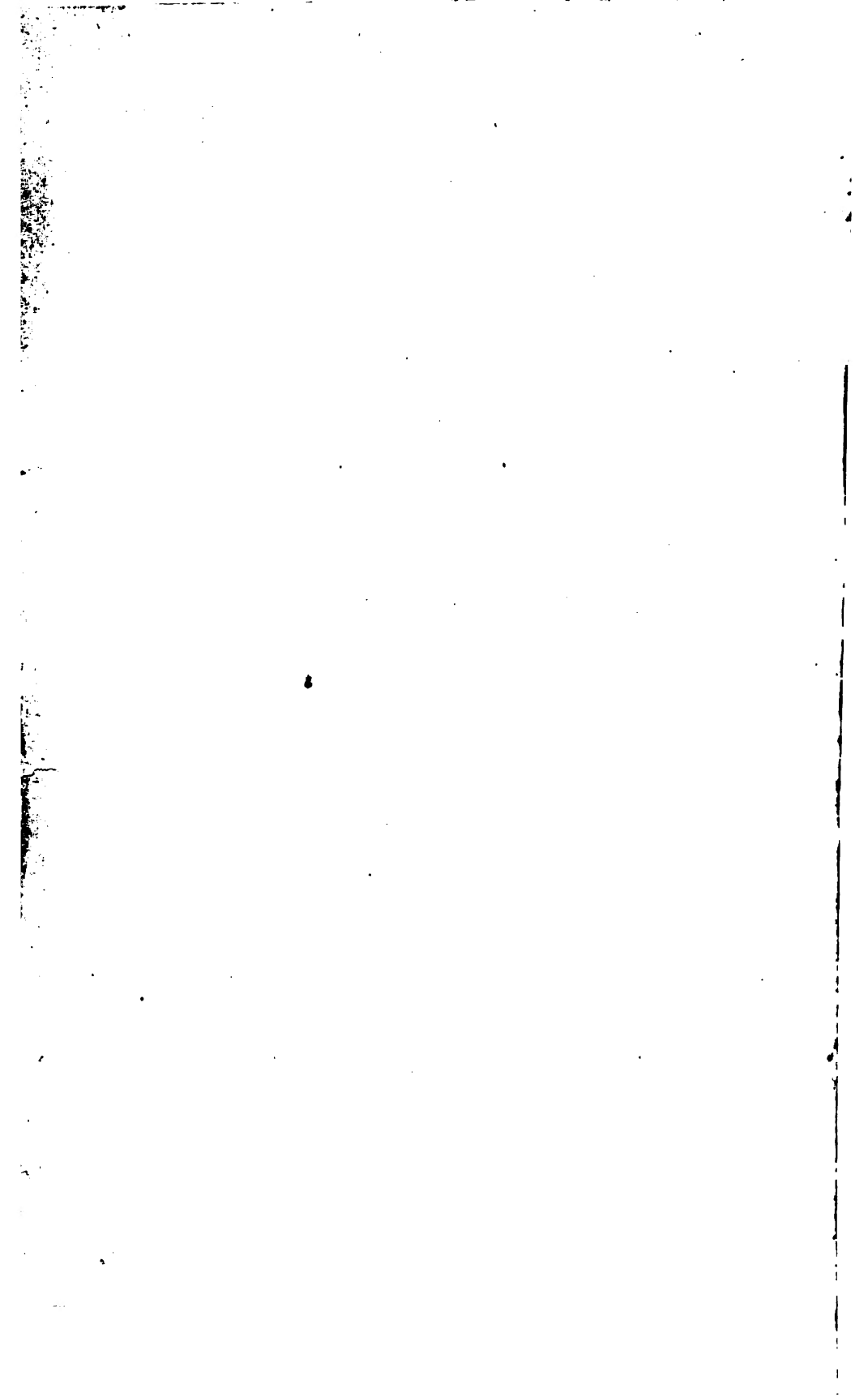
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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF JANUARY 16, TO DECISIONS
OF APRIL 10, 1894.

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXLI.

ALBANY:
JAMES B. LYON.
1894.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK

COMMENCING JANUARY 16, 1894.

GEORGE H. STONEBRIDGE, Jr., as Receiver, etc., Respondent,
v. GEORGE F. PERKINS et al., Appellants.

In an action brought by the receiver of an insolvent manufacturing corporation to set aside a transfer of property to defendant, made by the corporation in contemplation of insolvency, and so in violation of the statute (1 R. S. 603, § 4), and to compel payment of its value, the answer set up as a defense that subsequent to the transfer and before the appointment of plaintiff as receiver, third parties, under a judgment and execution against the corporation, sold the property as the property of the corporation, and so that plaintiff took no interest therein. It appeared that the amount bid on the execution sale was one dollar, and such sale was made for that sum. *Held*, that a finding was justified that the sale was made subject to the transfer.

It did not appear that the sheriff ever made an actual levy under the execution, and at the time the sale was made the property was not present or within the view of those attending the sale. *Held*, that no valid sale was established.

A sale of personal property upon execution affords no protection to a party defending under it, unless he shows, *first*, a levy, *in* *fact*, such an exercise of right and dominion by the officer over the property as would subject him to an action of trespass by the owner if the levy was not justified, and *second*, a sale with the property actually present and within the view of the persons attending the sale.

As to whether, even if a valid sale of the property upon execution had been shown, it would have constituted a defense in the absence of allegations connecting defendants with the title so obtained, *quære*.

(Argued December 22, 1893, decided January 16, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 3, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are set forth in the opinion.

Charles D. Ridgway for appellant. The sheriff's sale of September 14, 1888, transferred all the right, title and interest of the corporation in the property in question to the purchaser, so that neither the property nor any interest therein passed to the receiver by his appointment on the 12th day of February, 1889. (*Austin v. Bell*, 20 Johns. 442; *Booth v. Bunce*, 33 N. Y. 139; *Hess v. Hess*, 117 id. 306; *Best v. Staple*, 61 id. 71; *Tremaine v. Mortimer*, 128 id. 1; *Porter v. Parmley*, 52 id. 185; *Pringle v. Woolworth*, 90 id. 511; *C. C. Bank v. Risley*, 19 id. 369; *Whitney v. N. Y. & A. R. R. Co.*, 32 Hun, 173; *Hopkins v. Taylor*, 87 Ill. 436; *Fith v. Weatherby*, 110 id. 475; *McIlrath v. Suure*, 22 Minn. 391; *Davis v. Hoppock*, 6 Duer, 254; *Jacobs v. Remsen*, 12 Abb. Pr. 390; 36 N. Y. 668; *Whele v. Butler*, 12 Abb. Pr. [N. S.] 139.) The court below could not pronounce judgment under the pleadings and evidence in this case until the purchaser at the sheriff's sale had been brought in as a party. He is a necessary party to the action. (Code Civ. Pro. § 452; *Osterhoudt v. Bd. Suprs.*, 98 N. Y. 239; *Bear v. A. R. T. Co.*, 36 Hun, 400.) The General Term of the court below sought to avoid the consequences of this sale by saying that the "sheriff did not purport to act in hostility to the transfer to appellants, but only proposed to sell whatever remaining right, title and interest the New York Book Company had on and after August 2, 1888." This is erroneous. (*Roth v. Wells*, 29 N. Y. 471; *Barker v. Bininger*, 14 id. 270; *Bond v. Willett*, 31 id. 102; *Green v. Burke*, 23 Wend. 490; *Westervelt v. Pickney*, 14 id. 123; Code Civ. Pro. § 1428; *Pringle v. Woolworth*, 90 N. Y. 511.)

Frederic R. Kellogg for respondent. The plaintiff was duly appointed and qualified as permanent receiver of the New York Book Company, and is the proper plaintiff in this case. (*Osgood v. Laytin*, 3 Abb. Ct. App. Dec. 418.) The transfer by the New York Book Company to Perkins, Goodwin & Co. on June 1, 1888, was made in contemplation of the insolvency of the New York Book Company, and was, therefore, void under the provisions of the Revised Statutes. (3 R. S. [8th ed.] 1729.) The fact that after the transfer to Perkins, Goodwin & Co., and before the appointment of the receiver, an alleged execution sale was made under a judgment against the company of all of the company's right, title and interest in and to the property transferred, constitutes no defense to this action. (*Powers v. Elias*, 21 J. & J. 480; *Hale v. Sweet*, 40 N. Y. 97; *Porter v. Parmley*, 52 id. 185; *Mattison v. Baucus*, 1 id. 295; *F. Bank v. Cowan*, 2 Abb. Ct. App. Dec. 83; *Porter v. Williams*, 9 N. Y. 142; Gluck & Becker on Receivers, §§ 48, 49; High on Receivers, §§ 314, 315, 319, 320; *Curtis v. Leavitt*, 15 N. Y. 40; *Attorney-General v. L. Ins. Co.*, 77 id. 275; *P. C. Co. v. McMillan*, 119 id. 46; Waite Ins. Corp. §§ 199, 209; Beach on Receivers, §§ 702, 705; *Osgood v. Laytin*, 3 Abb. Ct. App. Dec. 418; *Osgood v. Ogden*, Id. 425; *Gillett v. Moody*, 3 N. Y. 429; *Gillett v. Phillips*, 13 id. 114; *Hastun v. Bishop*, 3 Wend. 17; Code Civ. Pro. § 1428; *Roth v. Wells*, 29 N. Y. 471; *Hathaway v. Howell*, 54 id. 97.) No error was committed by the court below in allowing receipt of the evidence showing similar transfers made at the same time as the one attacked, and proving the financial condition of the Provident Book Company. (*Pauldin v. C. Co.*, 94 N. Y. 534; *Spaulding v. Keys*, 125 id. 116; *Cary v. Hotelling*, 1 Hill, 316; *Hill v. Naylor*, 18 N. Y. 588; *Miller v. Barber*, 66 id. 558; *Lincoln v. Claflin*, 7 Wall. 138; *P. H. Co. v. Smith* 120 Mass. 446; *Hovey v. Grant*, 52 N. H. 569.)

O'BRIEN, J. The plaintiff, as receiver of the New York Book Company, a manufacturing corporation, brought this

action to set aside the transfer of certain property made to the defendants by the corporation in contemplation of insolvency, and in violation of the statute (1 R. S. ch. 18, title 4, § 4), and has thus far succeeded. The answer put in issue the plaintiff's character as receiver and his right to sue as such, and also the charge that the transfer was made in contemplation of insolvency. In a separate defense it was alleged that subsequent to the transfer, and before the appointment of the plaintiff as receiver, third parties, under a judgment and execution against the corporation, sold the property transferred to defendants as the property of the corporation, and under such sale acquired the title thereto, and hence the plaintiff never took any interest therein. The learned trial judge, upon sufficient evidence, found that at the time of the transfer the corporation was insolvent to the knowledge of the directors and managers who made it, and that it was in violation of the statute and void. He refused to find that the property was sold upon execution, in favor of the parties mentioned in the answer, or that the plaintiff's title and right to maintain the action were in any way affected thereby, and to this refusal the defendants excepted and the only question of law presented by the appeal arises upon these exceptions. The plaintiff sought to set aside a fraudulent transfer of the property of the corporation, and to compel payment by the defendants of its value. While the action was in form one in equity, it had all the characteristics of an action at law for conversion. Assuming, as the trial court found, that all the property of the insolvent corporation vested in the plaintiff as receiver, and that the transfer was void, there is no reason why the plaintiff could not have maintained an action at law for the recovery of the property from the defendants or its value. The separate defense pleaded by the defendants, and upon which their counsel now relies, was that the property belonged to a third person by virtue of the execution sale, but the defendants do not in any way connect themselves with this title, or claim any right under it. It is not clear that the facts stated under any circumstances constitute a defense. The general rule is that in actions of trespass or

trover, an answer of title in a stranger, without an allegation connecting defendant with such title, is no defense. (*Stowell v. Otis*, 71 N. Y. 36; *Duncan v. Spear*, 11 Wend. 54; *Rogers v. Arnold*, 12 id. 30; *King v. Orser*, 4 Duer, 431; *Hoyt v. Van Alstyne*, 15 Barb. 568; *Gerber v. Monie*, 56 id. 652.) And while this rule has been modified by statute in actions for the recovery of a specific chattel (Code, § 1723), the legislature has not in terms, at least, abolished it as to other actions. But there is no finding that the sheriff sold the property under the execution, in hostility to the transfer, and the court refused to so find. The sale was upon a judgment of \$100, and the amount bid was one dollar. The facts and circumstances disclosed at the trial were such that the trial court was justified in holding that the sale was subject to the transfer to defendants. In other words, the sale did not touch the fraudulent transfer, but left the defendants in the possession and enjoyment of the property, so that at best all the purchaser attempted to acquire was an intangible equity which was not the subject of sale on execution. But perhaps the plainest answer to the defendants' contention is to be found in the evidence in regard to the sale itself. The burden of proof was upon them to establish all the facts stated in the separate answer. They not only failed to show that the sheriff ever made a valid levy upon or sale of the property, but the contrary conclusion was a fair inference from the evidence. It did not appear that the sheriff ever made an actual levy under the execution, and no such fact has been found. The proofs warranted the court in finding that at the time that the auctioneer made the sale for the sheriff, the property was not present or within the view of the persons attending the sale. A sale upon execution of personal property affords no protection to a party defending under it unless he shows first a levy, that is, such exercise of right and dominion by the officer over the property as would subject him to an action of trespass by the owner, in case the levy was not justified, and, secondly, a sale with the property actually present and within the view of the bidders or persons attending the sale. (Code, § 1428; *Roth v. Wells*,

29 N. Y. 471; *Hathaway v. Howell*, 54 id. 97.) So that even if the defendants' answer, setting up title in a stranger under a sale upon execution, could be held good as against the plaintiff's claim without any allegation connecting themselves with such title, the facts upon which the defense rested were not established.

The judgment is right and should be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

JANE McKENZIE et al., Executrices, etc., Respondents, v.
LOFTUS D. HATTON, Appellant.

In an action to recover rent due under a lease of premises in the city of New York the defense was an eviction. The only act of the lessors upon which the defense was attempted to be supported was the giving to contractors for an excavation upon an adjoining lot a permit to enter on the premises, as required by the Consolidation Act (§ 474, chap. 410, Laws of 1882), in order to subject the party making the excavation to the obligation of protecting the building on the leased premises from injury. *Held*, that in the absence of any reservation in the lease of a right to enter for such a purpose, the permit of the lessors alone was insufficient to give a right of entry to the licensees, but the consent of the lessees was also necessary, and so, if the contractors entered without defendant's consent, for their trespass plaintiffs were not responsible, and the defense was not established.

Reported below, 70 Hun, 142.

(Argued December 15, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 30, 1893, which overruled defendant's exceptions and ordered judgment for plaintiffs on verdict directed by the court.

This action was brought to recover rent for three months of certain premises in the city of New York leased by the plaintiffs to defendant. The latter set up as a defense an eviction and interposed a counterclaim for damages on account thereof. A verdict was directed in favor of plaintiffs and

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defendant's exceptions ordered to be heard in the first instance at the General Term.

The facts, so far as material, are set forth in the opinion.

Foley & Powell for appellant. An eviction from a material part of the premises suspends the rent of the whole while the eviction continues. (*Myers v. Burns*, 35 N. Y. 269; *Mark v. Patchen*, 42 id. 167; *People ex rel. v. Gedney*, 10 Hun, 155; *Hexter v. Knox*, 63 N. Y. 561; Taylor on Landl. & Ten. § 315; McAdam on Landl. & Ten. § 215; *H. L. Ins. Co. v. Sherman*, 46 N. Y. 372; *Christopher v. Austin*, 11 id. 216; *Edgerton v. Page*, 20 id. 281; *Carter v. Byran*, 17 N. Y. S. R. 700; *B. S. Co. v. Radsky*, 14 id. 82.) The defendant did not grant any license to the adjoining owner or his contractors to enter the premises. (*Wood v. Leadbetter*, 13 M. & W. 838; *Mumford v. Whitney*, 15 Wend. 380; *Cook v. Stearns*, 11 Mass. 533; *Bridges v. Blanchard*, 1 Ad. & El. 536; *Freeman v. Headley*, 33 N. J. L. 523; *Pratt v. Ogden*, 34 N. Y. 22.) A license granted on condition does not become operative as a license unless the condition is performed. (*Mumford v. Whitney*, 15 Wend. 385; *Pratt v. Ogden*, 34 N. Y. 22; *Freeman v. Headley*, 33 N. J. L. 523; 72 N. Y. 311; 108 id. 179.) The fact that it was for the interest of the owners, the plaintiffs, to protect their building, is not an element in this case. (*Sherwood v. Seaman*, 2 Bosw. 127.)

Edward W. S. Johnston for respondent. No error is presented warranting this court in setting aside the verdict that was directed below. (*L. O. N. Bank v. Judson*, 122 N. Y. 282.) The verdict was properly directed. (*White v. Mealio*, 5 J. & S. 72; *Johnson v. Oppenheim*, 55 N. Y. 280; *Edgerton v. Page*, 20 id. 281; *Lawrence v. French*, 25 Wend. 443; *Gallup v. A. R. W. Co.*, 65 N. Y. 1; *Ketchum v. Newman*, 116 id. 427.) The refusal of the court to allow the defendant to go to the jury on the question of an eviction, or the damages contained in his counterclaim, was justified. (*Boreel v.*

Lawton, 90 N. Y. 293; *Edgerton v. Page*, 20 id. 281; *Lounsbury v. Snyder*, 31 id. 514; *H. Ins. Co. v. Sherman*, 46 id. 370; *Sparks v. Bassett*, 17 J. & S. 270.)

ANDREWS, Ch. J. The only act of the lessors upon which the defense of eviction is sought to be supported was the granting of the permit to the contractors for the excavation on the adjacent lot, to enter upon the leased premises "to do all things necessary for the purpose of preserving the walls and building from injury." The permit was given to comply with the conditions imposed by section 474 of the Consolidation Act (1882), in order to subject the party making the excavation to the obligation of protecting the building on the leased premises from injury therefrom. The permit of the lessors was not, however, alone sufficient to give a right of entry to the licensees. No entry could be lawfully made unless, in addition, the tenants consented. (*Johnson v. Oppenheim*, 55 N. Y. 280; *Sherwood v. Seaman*, 2 Bos. 130.) The right to enter for this purpose was not reserved to the lessors in the lease, and this made the consent of the lessees to such entry necessary to render the statute available. Both the lessors and the lessee were interested to impose upon the parties making the excavation the obligation to secure the leased building from any injury which might be occasioned thereby; the lessors because of their reversion, and the lessee because his obligation to payment would continue, notwithstanding the premises were rendered untenable as the result of the excavation, so long, at least, as he retained possession. (*Johnson v. Oppenheim*, *supra*.) The covenant in the lease on the part of the lessors to repair was limited, and did not impose upon them an obligation to repair in case of injury from such a cause. This was the situation when the permit of the lessors was given. The permit was not a direction by lessors to the contractor to enter upon the premises. It was an authority simply, which would become complete when supplemented by a similar authority from the defendant. It is a clear inference from the evidence that the lessors and the

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lessee so understood the transaction. The defendant testified that before the entry he was informed by the attorney for the lessors that the permit had been given, and on being assured that this was right he testifies that he made no objection. Here, so far as appears, the relation of the lessors to the transaction ended. The contractors, having the permit, subsequently went to the defendant and insisted upon the right to enter to shore up and brace the building, and the defendant stated that he had given them no authority, and informed them that he required to be secured against loss or damage, and that he would hold them responsible until he consulted counsel. The contractors insisted that they would enter "anyway," and then the defendant desired them to consult with his engineer. There is evidence that the defendant consented to the entry by the contractors and only objected after he found that the insertion of needle beams interfered with the use of his engine room. But if the contractors entered by force, without the defendant's consent, they were trespassers, and so also if they abused any license they had. For this the lessors were not responsible, for the clear import of the evidence is that they did nothing in act or intention hostile to the right of the defendant under the lease.

The judgment should be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
SARA N. WORTHINGTON et al., Executors, etc.

The commissions of an executor, until ascertained and liquidated in the manner prescribed by law, are not subject to his disposal, but upon grounds of public policy are unassignable.

Where, therefore, one claiming under an assignment of his commissions, executed by an executor before settlement of his accounts, appealed from an order of the General Term affirming an order of the surrogate denying a motion made by said assignee to open and modify his decree, made on settlement of the accounts of the executors, which decree refused

commissions to the assignee, *held*, that the appellant had no interest authorizing him to make the motion or bring the appeal.

(Argued December 19, 1893; decided January 16, 1894.)

APPEAL by John A. Bryan from order of the General Term of the Supreme Court in the second judicial department, made February 13, 1893, which affirmed an order of the surrogate of Westchester county, denying a motion to open and amend a decree, settling the accounts of the executors and trustees under the will of Henry R. Worthington, deceased.

The facts, so far as material, are set forth in the opinion.

Alexander V. Campbell for appellant. The executor's commissions were assignable and the surrogate erred in holding that the petitioner was not a "person interested," and so not entitled to be cited, nor to make himself a party. (Code Civ. Pro. §§ 2514, 2731, 2796.)

William A. Jenne for respondent. The commissions of an executor are not assignable, and an instrument purporting to assign the same is void. (*Wheelwright v. Rhoades*, 20 Hun, 57; *In re Hayden*, 54 id. 197; *In re Manice*, 31 id. 119; Code Civ. Pro. § 1910; *B. N. Bank v. Wilson*, 122 N. Y. 478, 482; *Bliss v. Lawrence*, 58 id. 442; *Taft v. Marsifly*, 120 id. 474; *Townsend v. Townsend*, 88 id. 24; *Platt v. Platt*, 105 id. 488; *Decker v. Seltzman*, 59 id. 275; *Daly v. Stetson*, 22 J. & S. 202, 212; *Zabriskie v. Smith*, 13 N. Y. 322; *Lamphere v. Hall*, 26 How. Pr. 509; *Brooks v. Hatfield*, 15 Abb. Pr. 342; *Abbott v. A. H. R. Co.*, 33 Barb. 578, 594; *Ten Eyck v. Craig*, 62 id. 406, 420; *Moore v. Moore*, 5 id. 256, 262; *Ackermann v. Emott*, 4 Barb. 62; *Glacius v. Fogel*, 88 N. Y. 234.)

Per Curiam. This appeal has been taken from an order of the General Term affirming an order of the surrogate refusing to open and modify a decree entered upon the final

judicial settlement of the accounts of the surviving executors of the will of Henry R. Worthington, deceased.

The appellant claims no other interest in the estate of the decedent than that derived from an assignment by one of the executors of his commissions. This executor was subsequently declared a lunatic and removed for mental incapacity, and died before the remaining executors had rendered an account. The executrix of the removed and deceased executor was made a party to the accounting, and the surrogate rendered a decree in which it was, among other things, adjudged that the removed executor was not entitled to commissions because he took no part in the management of the estate, or in the making and keeping of the accounts of the executors. The appellant was not cited nor heard in this proceeding, and we think it is clear that he had no such vested title, either legal or equitable, to any share or interest in the assets or property of the estate to be distributed upon the accounting or affected by it, as conferred upon him the right to be made a party to the proceeding or to be heard upon the settlement and entry of the decree. It may be conceded that the assignment of the commissions was made for a good consideration and that the removed executor had actively participated for many years in the management and administration of the estate, and that his representatives were, therefore, entitled to some consideration upon the final allowance of commissions by the surrogate. The difficulty in the way of the appellant is of another kind. Until ascertained and liquidated at the times and in the manner authorized by law, the commissions are not subject to the executor's disposal, but the right to them is inchoate, and upon grounds of public policy unassignable. There is no fundamental distinction in this respect between public and private trusts, where the statute fixes the compensation and prescribes that it shall not become due and payable until the services have been rendered, or at stated periods during the term of service. It is well settled that a public officer cannot, during his official term, and before his salary or fees become due and payable, make a valid

assignment of such salary or fees. (*Bliss v. Lawrence*, 58 N. Y. 442; *Bowery Nat. Bk. v. Wilson*, 122 id. 478.) It is believed that the efficiency of the service to be rendered depends upon the enforcement of such a rule. If the emoluments of the office might be separated from it and transferred to another, it would leave the duties of the office as a barren charge to be borne by the incumbent. It is evident that transfers of this kind would not tend to promote activity and care in the discharge of official obligations. The same considerations forbid the recognition of an assignment by an executor of his commissions in advance of the time prescribed by law for their adjustment and payment. When the hope of compensation is gone, a strong incentive to diligence and zeal is wanting, and the temptation to be content with a lax or perfunctory administration of the trust becomes more persuasive.

As the appellant failed to establish a valid title to any interest in the estate of the decedent, we are not required to consider the other questions discussed upon the argument of the appeal.

The order of the General Term must be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Order affirmed.

STEPHEN D. SIMONSON, as Sole Surviving Executor, etc.,
Respondent, v. THE NEW YORK CITY INSURANCE COMPANY,
Appellant.

S., plaintiff's testator, was, prior to September 27, 1881, defendant's president and principal manager; his salary was \$5,000 per annum. On that date an agreement, negotiated by S., was entered into between defendant and another insurance company, by which the latter agreed to re-insure all the risks of the former, it being desirous, as the agreement recited, to retire from business. Defendant agreed to continue in active business until October 1, 1881, and thereafter at the risk and expense, and on account, of the other company, which then agreed to assume, and defendant agreed to assign to it, the lease of its offices. In an action to recover

salary after October thirty-first, up to which time S. had drawn it, it appeared that at the date of the execution of said contract, S., by written agreement, entered into the employment of the other company at a salary of \$7,500 and commissions, he agreeing to devote his entire time to its service, unless specially authorized to undertake other duties. S. did not sign or request any check for his salary after October, and made no claim therefor. At a regular meeting of defendant's directors, S. proposed that the salary of its secretary, which was fixed at the same time as his own, should, until its business was wound up, be paid one-half by it, and one-half by the other company. Evidence was given of the rendition of some services by S. for defendant after October, and up to the time of his death, which services were mostly of a formal character, and such as he was bound to render under his contract with the other company. *Held*, that in the absence of evidence of an agreement or understanding that the salary of S. was to continue, it could not be presumed; and that the action was not maintainable.

(Argued December 20, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1892, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are set forth in the opinion.

Wheeler H. Peckham for appellant. The court erred in refusing to dismiss the complaint. (*L. I. F. Co. v. Terbell*, 48 N. Y. 427.)

Sidney F. Rawson for respondent. The plaintiff is entitled to recover. (*Smith v. L. I. R. R. Co.*, 102 N. Y. 190; *Mather v. E. M. Co.*, 118 id. 629.)

EARL, J. John W. Simonson died December 28th, 1882, leaving a will in which his widow and the plaintiff, his son, were appointed executors. The widow died April 23d, 1883. On the 31st day of March, 1884, the plaintiff commenced this action to recover the salary of the testator as president of the defendant at the rate of \$5,000 per annum, from the 31st day

of October, 1881, to the time of his death, and the plaintiff has recovered judgment as claimed in his complaint. The question for our determination is whether there is any evidence in this record upon which the recovery can legally stand. We think there is not.

On the 10th day of January, 1881, at a meeting of the directors of the defendant, the salary of its president was fixed at \$5,000, and of its secretary at \$2,500, per annum. Prior and subsequent thereto to the time of his death the testator was the president of the defendant and acted as such; and if there were nothing else the plaintiff would be entitled to recover the salary as claimed. The presumption would be that the testator served as president for the salary attached to the office, and that such was the understanding between him and the defendant. But that is merely a *prima facie* presumption which is conclusive if not rebutted, but rebuttable by facts and circumstances put in evidence. It is not sufficient as the basis of a claim for the salary when it is entirely inconsistent with all the other aspects of the case as conclusively proved.

Now, what are the other facts? The testator was the principal manager as well as president of the defendant prior to September 27th, 1881, and some time before that date, on its behalf, he entered into negotiations with the Standard Fire Office, Limited, of England, for a transfer of all its business and risks to that company, and on that date the two companies entered into an agreement, in substance as follows: After reciting that the Standard company was desirous of acquiring and purchasing the business and good will of the New York city company, and that the New York city company was desirous of re-insuring its risks and withdrawing from business, the Standard company agreed to re-insure all the risks of the New York city company which should be in force October 1st, 1881, at 12 o'clock noon, and to that end to use its best endeavors to substitute its policies in place of the policies of the New York city company, and to cancel and discharge the surrendered policies. The New York city company agreed to

continue active business until October 1st, 1881, at noon, and thereafter, at the risk, expense and for the account of the Standard company, until such time as the Standard company should have become authorized to transact business in the different states in which the New York city company had agencies. It was further agreed that the agents that should be appointed by the Standard company, whether they were those then acting for the New York city company or not, should be required to use their best efforts to obtain the surrender of the outstanding policies of the New York city company, and that if, notwithstanding every exertion so made, it should happen that persons holding such policies should refuse or neglect to make such surrender or exchange within one year from that date, then the Standard company was to use its best endeavors to cancel such policies by paying the holders thereof the return premiums as provided in the policies, and the New York city company agreed to turn over all its business to the Standard company on the 1st day of October, 1881, at noon, all losses sustained under the policies by the New York city company, and expenses up to October 1st, 1881, at noon, to be paid and discharged by the New York city company. It was further agreed that the Standard company would assume and the New York city company would assign the lease of the premises occupied by it for its offices. This agreement alone, if there were nothing else, would present very strong evidence that the salary of the testator as president was not to survive beyond the month of October, 1881. The defendant transferred all its business to the Standard company and was to go out of business. Can it be presumed that the salary of the testator, fixed for an active, going company, was thereafter to continue? Such a presumption would be against all experience. But there are other facts. On the same 27th day of September, the testator, by a written agreement, entered into the employment of the Standard company as its resident manager in the United States, at a salary of \$7,500 per annum and a commission of ten per cent upon the profits of the business under his charge, and he agreed to

devote his entire time and energies to the services of the Standard company, unless specially authorized by letter from the general manager for the time being to undertake any other duties, and to carry on its business with energy and vigor, and to use all lawful means to transfer the business of the New York city company to the Standard company. So, not only did the defendant transfer all its business to the Standard company, but the testator entered into the service of that company, agreeing to give it his whole time and all his energies, and he was to receive a salary larger by \$2,500 per annum, besides the commissions, than he had been receiving from the defendant. Can it be presumed that his salary as president of the defendant was to continue, and that such was the understanding between him and the defendant, and that thus he was to have two salaries amounting to \$12,500 per annum, besides the commissions? We think the plaintiff should have given some proof that after the testator entered into the service of the Standard company, which succeeded to all the business of the defendant, it was understood between him and the defendant that his salary of \$5,000 was to continue.

But there are still other facts. Prior to October 1st, 1881, the testator signed the monthly checks for his salary and the salaries of the secretary and other employees in the office of the defendant, and he signed a check for his salary for the month of October, 1881. Never after that did he sign or request any check for his salary or make any claim for salary, although he signed the monthly checks for the salaries of the secretary and other clerks of the defendant. He drew his salary for the month of October probably because he had entered upon the business of that month before the transfer to the Standard company was fully accomplished. It is thus clear that he did not understand that he was entitled to any salary after October from the defendant; and this is made still plainer by another circumstance. At a regular meeting of the directors of the defendant in February, 1882, he proposed that the secretary, after the first day of May, following,

be employed by both companies, and that his salary of \$2,500 be paid, \$1,500 by the Standard company and \$1,000 by the defendant until it was wound up. The salary of the secretary of the defendant was fixed at \$2,500 at the same time the salary of its president was fixed at \$5,000. If it was then understood that the salary of the testator, as president of the defendant, was still continued at \$5,000, then was the time to deal with it, and it undoubtedly would have been dealt with in some way.

It is also a significant fact that no claim for this salary was made even in the lifetime of the widow of the testator, and that it was first claimed in July, 1883.

Upon the trial the plaintiff, as a witness on his own behalf, gave some evidence tending to show the rendition of some services by the testator as president of the defendant from October 31st, 1881, to the time of his death, and that he had express permission of the Standard company to act as president of the defendant. These services were largely of a formal character and such as he was bound to render under his contract with the Standard company. They were not to interfere, and did not interfere, with the services due to the Standard company under his contract with it. Whatever these services were, for reasons we have given, we do not think that they were rendered under any contract or understanding between him and the defendant that he was to be compensated for them by the salary now claimed.

This is not a case of conflicting evidence or of doubtful inferences. The whole evidence, fairly considered, disproved the claim of the plaintiff, and there was nothing for the consideration of the jury.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

All concur, except PECKHAM, J., not voting, and BARTLETT, J., not sitting.

Judgment reversed.

ELIZA BIRD et al., Respondents, v. SAMUEL PICKFORD et al., as
Executors, etc., Appellants.

The will of B. gave his residuary estate to his executors in trust to divide the net income equally between a daughter-in-law and two cousins of the testator, "the survivor or survivors of them during their natural lives" In case the cousins died before the daughter-in-law "the *corpus* of said trust estate" was given to the latter; if she died before the cousins it was given to the person or persons she should designate by will. In an action for the construction of the will, *held*, that these provisions did not violate the statute against perpetuities, and were valid, as in no event could the estate be tied up longer than during the lives of the two cousins.

Bird v. Pickford (71 Hun, 142), reversed.

(Argued December 20, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made August 5, 1893, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John R. Tresidder for appellants. The duration of the trust is limited to two lives in being at the death of the testator, namely, those of Rachel and Addie Van Gilder, and upon their death the trust must terminate absolutely in every possible contingency. (*Crooke v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, 97 id. 460; *Tilden v. Green*, 130 id. 29; *Loughneedy v. D. B. Church*, 129 id. 211-215; *Townsend v. Fromme*, 125 id. 446-455; *In re McGraw*, 111 id. 66-110; *Nellis v. Nellis*, 99 id. 505-512; *Gilman v. Reddington*, 24 id. 1-15.)

Jehiel T. Hurd for respondents. A trust is created by the residuary clause during the lives of three persons in being at the death of the testator. (*Moore v. Hegeman*, 72 N. Y. 24; *Vernon v. Vernon*, 53 id. 359; *DeLafield v. Shipman*, 103 id.

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463; *Ward v. Ward*, 105 id. 68; *Robert v. Corning*, 89 id. 285.) The trust is invalid because it may suspend the absolute ownership of personal property for more than two lives in being. (*Shipman v. Rollins*, 98 N. Y. 330; *Colton v. Fox*, 67 id. 348; *Underwood v. Curtis*, 127 id. 537; *Fowler v. Ingersoll*, Id. 472.) Mere possibility that the estate will be tied up beyond the time permitted by the statute is sufficient to condemn the provision. (*Smith v. Edwards*, 88 N. Y. 104; *Hawley v. James*, 16 Wend. 121; *Haynes v. Sherman*, 117 N. Y. 437.) The estate was and is inalienable by virtue of said trust, and is likely to continue so during the three lives mentioned. (*Cruikshank v. Chase*, 113 N. Y. 337; *Hobson v. Hale*, 95 id. 610.) Thus far we have considered the situation largely on the assumption that Ophelia would die intestate or leaving an invalid will, but the unlawful suspension likewise follows if she had made a will. (1 R. S. 727, §§ 60, 61; *Crooke v. County of Kings*, 97 N. Y. 421.) The claims made by the defendants to relieve this trust from the statute are untenable. (*Knox v. Jones*, 47 N. Y. 398; *Ward v. Ward*, 105 id. 75; *Colton v. Fox*, 67 id. 352; *Vanderpoel v. Loew*, 112 id. 177; *Post v. Rohrbach*, 142 Ill. 600.) The court must construe the will according to the intent as gathered from the language. It will not, to sustain a will, make a new one. (*Phillips v. Davis*, 92 N. Y. 204; *Newell v. People*, 7 id. 97; *Cottman v. Grace*, 112 id. 299.) The court had jurisdiction. (*Wager v. Wager*, 89 N. Y. 161.)

EARL, J. This action was commenced for the construction of two clauses in the will of William Baltz, deceased. The clauses are as follows:

"*Thirdly.* I give and devise all the rest of my estate, real and personal, to my executors hereinafter named, in trust nevertheless to invest and keep the same invested and divide the net income arising therefrom equally among my said daughter-in-law, Ophelie Baltz, and my said cousins, Rachel and Addie Van Gilder, the survivors or survivor of them during their natural lives.

"*Fourthly.* If my said consins, Rachel and Addie Van Gilder, should die before my said daughter-in-law, Ophelioe Baltz, then, and in that event, I give and devise the *corpus* of said trust estate to the said Ophelioe Baltz, her heirs and assigns forever; but if my said daughter-in-law, Ophelioe Baltz, should die before my said consins, Rachel and Addie Van Gilder, then, and in that event, I give and devise the *corpus* of said trust estate to such person or persons as my said daughter-in-law, Ophelioe Baltz, may designate in her last will and testament."

The plaintiffs, who are the heirs and next of kin of the testator, claim that these clauses violate the statute against perpetuities, and are, therefore, void. The Special Term held that they are valid and the General Term that they are void. We agree with the Special Term.

The first of the two clauses vests the *corpus* of the trust estate in the trustees and creates a trust for the three beneficiaries named. Standing alone, that clause would suspend the absolute ownership of personal property, and the absolute power of alienation of real property for more than two lives in being, and would, therefore, be void. But it must be construed in connection with the succeeding clause, and there it is plainly provided that the trust shall not survive the lives of the two consins. If they die before Mrs. Baltz then the trust is to cease and the *corpus* of the estate is to go to her absolutely. If she dies before them, then the *corpus* of the trust estate is to go to such persons as she may designate in her will. In that event the trust terminates at her death, and it has not lasted for the full term of the lives of the two consins. But suppose she dies intestate or without making any appointment of the estate by will, then one of two things will happen; either the *corpus* of the estate will pass absolutely to the heirs and next of kin of the testator, or it will pass to them subject to the trust for the lives of the two consins. So it is clear that in no event can the estate be tied up longer than during the lives of the two consins, and hence there is no illegal suspension of the ownership or the power of alienation. It is not

sufficient to condemn these clauses that the absolute power of ownership and of alienation may be suspended for three lives or for many lives, provided that such suspension be bounded by two designated lives in being at the death of the testator. (*Crooke v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, Id. 460.)

The judgment of the General Term should, therefore, be reversed, and that of the Special Term affirmed, with costs of the appeals to the General Term and to this court to be paid by the plaintiffs to the defendants.

All concur, except BARTLETT, J., not sitting.

Judgment reversed.

In the Matter of the Judicial Settlement of the Accounts of
JANE A. McDUGALL et al., as Administrators, etc.

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By the will of S. he gave his residuary estate to his wife, "to be used and enjoyed by her" during life or as long as she should remain his widow, and at her death or re-marriage then the same to be equally divided between other persons named in the will; the same to be "received and accepted" by her in lieu of dower. The testator left personal estate only, which was converted into money. The executor died and an administrator with the will annexed was appointed, who incurred some expense as such. Upon settlement of the executor's accounts the surrogate decreed that the whole fund should be paid over by the administrator of the executor directly to the widow, who was then a resident of another state, and that she was entitled to the possession thereof without giving security. *Held*, error; that the administrator with the will annexed was entitled to have the money paid over to him, and if he had made any disbursements, or incurred any obligations properly chargeable to the estate, he was entitled to an opportunity of proving this and to a decree for their payment; also, that the will simply gave to the widow an estate for life or during widowhood, and upon the happening of either event the remaindermen were entitled to the whole *corpus* of the estate; that as the property was not of a kind which must be individually possessed in order to be enjoyed, she was not entitled to possession without giving security.

Smith v. Van Ostrand (64 N. Y. 278); *Flanagan v. Flanagan* (8 Abb. [N. C.] 413); *In re Woods* (35 Hun, 60); *Thomas v. Wolford* (1 N. Y. Supp. 610); *Champion v. Williams* (36 N. Y. S. R. 706), *In re Grant* (16 N. Y. Supp. 716), distinguished.

(Submitted December 21, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a decree of the Surrogate's Court of Steuben county upon a final settlement of the account of the administrators of John McDougall, executor of the will of Dan E. Spooner, deceased.

Dan E. Spooner died in 1871 while a resident of Steuben county in this state. He left a will which was duly admitted to probate in Steuben county in August, 1871. He nominated John McDougall as his executor, who duly qualified. He left a widow, a mother and a brother surviving him. He left a legacy of five hundred dollars to his mother, one thousand dollars to his brother, and "Third, all the rest, residue and remainder of my estate, both real and personal, I give and bequeath and devise unto my well-beloved wife, Cornelia Spooner, to be used and enjoyed by her during the term of her natural life, or as long as she shall remain my widow, and at her death or marriage then the same to be equally divided between my said mother, Sarah A. Spooner, and my said brother, John C. Spooner, share and share alike, and to their heirs and assigns forever. The above to be received and accepted by said wife in lieu of dower." The testator left personal estate only, and it amounted to a trifle over \$8,000. The executor paid all debts and the other legacies, so that there was left as the "rest and residue" of the estate a sum of \$6,000, and from 1871, down to the death of the executor, he had regularly paid the interest upon that sum to the widow, Mrs. Spooner. Mr. McDougall died November 2, 1888, the interest on the \$6,000 having been duly paid up to the preceding first of October. McDougall had never rendered any formal account of his proceedings as executor of Spooner's estate. Jane A. McDougall and Shirley E. Brown were, in November, 1888, appointed administrators of the estate of John McDougall. They admit the possession as such administrators of the \$6,000, the "rest and residue" of the Spooner estate.

John C. Spooner, the brother of Dan E. Spooner, and

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Statement of case.

named as one of the residuary legatees in his will, was appointed by the Surrogate's Court of Steuben county, on or about Dec. 1, 1890, the administrator with the will annexed of the estate of said Dan E. Spooner. The sole parties interested in the estate of Dan E. Spooner at the time of the commencement of these proceedings were Cornelia Spooner, the widow of Dan, and John C. Spooner, his brother, who is now sole surviving residuary legatee and administrator of his estate with the will annexed. As such administrator John C. Spooner commenced proceedings for a final accounting of the administrators of the estate of McDougall as executor of the Spooner estate. Then the administrators of that estate commenced like proceedings, and subsequently the widow, Mrs. Spooner, commenced similar proceedings, so that all the parties in interest in the matter were before the court. The different parties then in open court all appeared upon each of these proceedings and the court proceeded, with the consent of all parties, to an immediate and simultaneous hearing of all the petitioners. It was not disputed that all the debts of the deceased, Dan E. Spooner, had been paid by McDougall, together with all the legacies, excepting the \$6,000, which were in the hands of the administrators of McDougall ready to be distributed under the decree of the surrogate, and they waived all right to commissions on the moneys in their hands.

Counsel on behalf of the widow demanded of the administrators of McDougall that they should pay to her the *corpus* of the estate of \$6,000, and also the interest which had accrued thereon. This was objected to by John C. Spooner, as the administrator with the will annexed of the estate of Dan E. Spooner, and also by him as the sole remainderman in the said legacy. The surrogate decided that he had the right and it was his duty to decree the payment of the \$6,000 directly to the widow as the legatee under the above-cited third clause in the will of Dan E. Spooner and that she was entitled to the custody and possession of the *corpus* of such estate without giving any security therefor.

Mrs. Spooner, the widow, is a non-resident of the state and

a resident of the city of Minneapolis in the state of Minnesota. The General Term has affirmed this decree, and John C. Spooner, as the administrator with the will annexed, and also as remainderman, has appealed here.

J. Rosecrans for appellant. The estate of Dan E. Spooner, deceased, should be paid to the administrator with the will annexed, and the refusal of the surrogate to so find was error. (*Douglass v. Satterlee*, 11 Johns. 16; *Murray v. Blatchford*, 1 Wend. 583; *Valentine v. Jackson*, 9 id. 302; *Babcock v. Booth*, 2 Hill, 181; *Kaufman v. Schoeffel*, 46 Hun, 571; *Schultz v. Pulver*, 11 Wend. 361; *Bowers v. Emerson*, 14 Barb. 652; Code Civ. Pro. §§ 2560, 2562, 2603, 2606, 2743; *Spencer v. Popham*, 5 Redf. 425; *Sperb v. McCann*, 15 Civ. Pro. Rep. 371; *Livingston v. Murray*, 68 N. Y. 485; *Smith v. Van Ostrand*, 64 id. 282; *Tyson v. Blake*, 22 id. 558; *Willard on Exrs.* 389; *Spear v. Tinkham*, 2 Barb. Ch. 231; *Clark v. Clark*, 8 Paige, 152; *Connehour v. Sheler*, 2 id. 122.) The widow, Cornelia Spooner, having applied by petition for a settlement of the accounts of the deceased executor, John McDougall, the court erred in overruling the administrator's demurrer and objections to her demand, and finding that she was entitled to have the whole estate paid over to her without giving security. (*Smith v. Van Ostrand*, 64 N. Y. 282; *Tyson v. Blake*, 22 id. 558.) The surrogate has no jurisdiction as matter of law, and cannot construe the will of decedent on this accounting. (Code Civ. Pro. § 2606; *Kelsey v. Van Camp*, 3 Dem. 530.)

J. F. Parkhurst for respondent. Respondent Cornelia Spooner is entitled, under the will, to the possession of the residue of the estate during her life or widowhood. (*Roseboom v. Roseboom*, 81 N. Y. 356; *In re Woods*, 35 Hun, 60-64; *Champion v. Williams*, 36 N. Y. S. R. 706; 103 N. Y. 648; *In re Yates*, 99 id. 94; *Flanagan v. Flanagan*, 8 Abb. [N. C.] 413; *In re Benedict*, 16 N. Y. Supp. 716; *Smith v. Van Ostrand*, 64 N. Y. 278; *Thomas v. Walford*,

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1 N. Y. Supp. 610.) The surrogate had jurisdiction in these proceedings, and it was his duty to direct that the *corpus* of this estate be paid to the widow. (Code Civ. Pro. §§ 2603, 2606.)

PECKHAM, J. If otherwise proper, we may for this purpose assume that by the practical consolidation of all three proceedings before the surrogate, he had the power to decree the payment of this legacy by McDougall's administrators directly to the party to whom it was unquestionably due, all debts and other demands (if any) entitled to priority of payment having been first paid by the deceased intestate executor. We are not disposed to hold that the surrogate must, under such circumstances, direct the payment to the administrator with the will annexed, for the sole purpose of thereby enabling him to include the amount in his accounts upon which to reckon his commissions.

This, however, is not such a case.

In the first place, it seems to have been one of the facts conceded on the hearing that John C. Spooner, the administrator with the will annexed, had been to some expense in relation to taking out letters of administration and for disbursements in regard thereto. Whether such expenses and disbursements should be charged against the estate does not seem to have been affirmatively disposed of by the surrogate, further than by ordering the whole balance of the estate paid to the widow. If the administrator has made any disbursements or incurred any obligations for which the estate is properly chargeable, he should have the opportunity of proving that fact and having a decree made for their payment out of the estate. Whether he has or not we do not say, for in the absence of further evidence we cannot determine that matter. The surrogate can decide the point when it is properly presented.

He has decided in this case that the widow is entitled, as matter of law, to the unconditional possession of the \$6,000, "rest and residue" of this estate, without giving any security whatever.

The property which is to be intrusted to her is not of the description of chattels which must be individually possessed in order to be enjoyed. It is \$6,000 in cash which the widow is thus to take possession of and carry with her to a distant state, and beyond the jurisdiction of our courts. The remainderman is thus left wholly without any other protection than the responsibility of the non-resident widow.

The right to make such decree is based by the surrogate upon the language of the will as contained in the above-cited third clause. Because the testator says that he leaves the "rest and residue" of his estate to his wife, "to be used and enjoyed" by her during her life or widowhood, such expression, in the opinion of the courts below, necessarily requires that she shall have the possession of the legacy so as to use and enjoy it. On the contrary, we think the testator meant to give the widow nothing but an estate for her life or widowhood, and that the remaindermen were entitled to receive, upon her death or marriage, the whole *corpus* of the estate. There was certainly no occasion for the possession of the *corpus* by the widow if she were to have no right to use anything more than the income, and the possession of the *corpus* would give her no right under this will to use any portion of it. The expression "to be used and enjoyed by her" gave her no enlarged interest in such legacy beyond what she would have received if such expression had been omitted. By the use of the language which follows the expression, the intention of the testator is made manifest and the widow thereby takes but an estate terminable at her death or re-marriage, and without power to expend any portion of the *corpus* for any purpose whatever. In such a case the legatee for life is not entitled to possession of the *corpus* without giving security, certainly not if he be insolvent or a non-resident. In other cases where it has been held that the legatee was entitled unconditionally to the possession of the legacy without security, other facts existed, such as where the language of the will made it manifest that the testator intended to give to the legatee power to use in his discretion

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some portion of the *corpus* of his estate for his support, or a right to dispose of it during his life by gift or otherwise, or else it appeared that it was personal property of the nature of chattels which would require possession in order to enjoy the gift and such possession was clearly contemplated by the testator, or the whole scheme of the will or the terms of the particular legacy were such as to show that the testator intended to give a legacy of money for life only, and yet clearly intended the life legatee to have possession thereof and trusted to him not to waste, use or otherwise dispose of the *corpus*. The cases cited by the counsel for the respondent embody some such principle as is thus stated. (*Smith v. Van Ostrand*, 64 N. Y. 278; *Flanagan v. Flanagan*, 8 Abb. [N. C.] 413; *In re Settlement Wood's Estate*, 35 Hun, 60; *Thomas v. Walford*, 1 N. Y. Supp. 610; *Champion v. Williams*, 36 N. Y. St. Repr. 706; *In re Grant*, 16 N. Y. Supp. 716.) This is not like any of those cases. No such simple and plain language as this will contains can properly be construed as enlarging the quality of the estate of the life tenant, and no language can be found in it from which it can be inferred that the intention of the testator was to intrust the widow with this whole residue of the estate in cash, and waive the giving of any security by her. I have found no case where language similar to that employed in this will has been held to convey anything more than a life estate. That the legacy was in lieu of dower gives her no larger estate than she would have taken without those words. She had no right on that account to use or give away or otherwise dispose of any part of the *corpus*. The language is plain and unambiguous, and cannot be enlarged by any implication arising from the fact that it is given in lieu of dower.

Nor does such language authorize the delivery of the legacy to the legatee without exacting security. It is in lieu of dower, but the fact still remains that it is a life or during widowhood legacy of money, and the widow is a non-resident of the state. Possession of the *corpus* was not at all necessary to the enjoyment of the legacy in the manner and to the

extent intended by the testator, as such intent can be gathered from the language he employed in his will. If the property were chattels or something of that nature which, in order to be physically used or enjoyed, must be possessed, then the proper course would be to exact an inventory of such property, and an acknowledgment that it was held for life only, with the title in the remainderman subject to the precedent life estate. (1 Sto. Eq. Jur. § 604, note 1; *Covenhoven v. Shuler*, 2 Pai. 122, 132; *Tyson v. Blake*, 22 N. Y. 558; *Livingston v. Murray*, 68 id. 485.)

The above cases also show that it is the right of the executor in a case like this, before paying over to a life legatee a life legacy in money, to exact security from such legatee for the forthcoming of the *corpus* of the legacy at the time of the termination of the life or other happening of the contingency provided for. Where the life tenant is insolvent or a non-resident of the state, it is still more certain that the remainderman has a right to demand that the life tenant shall give security before the *corpus* of the legacy is delivered to him. (*Clarke v. Terry*, 34 Conn. 176; *In re Petition of Camp*, 126 N. Y. 377, 385.)

The surrogate should have directed the payment of the moneys to the administrator with the will annexed, who should have the opportunity of proving his legitimate charges against the estate, and, after payment thereof, he should be decreed to invest the balance (after deducting costs as herein directed), and pay the interest thereon to the widow, or if she elect to take the *corpus*, then she should be permitted to do so upon giving security in the shape of a bond, with sureties to be approved by the surrogate and running to the administrator with the will annexed, or his successor, conditioned for the payment of the whole *corpus* of the legacy to him upon the death or re-marriage of the widow.

The costs at General Term and in this court of the administrator with the will annexed to be first deducted from the *corpus* of the estate under the direction of the surrogate, together with the several allowances heretofore made by him.

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No costs should be allowed the life legatee in the General Term or in this court.

The decree appealed from must, therefore, be reversed and the record remitted to the surrogate of Steuben county for further proceedings in conformity with this opinion.

All concur, except BARTLETT, J., not sitting.

Decree reversed.

THOMAS SMITH, Appellant, v. THOMAS ISAAC SMITH et al.,
Appellants, et al., Respondents.

The will of S. gave the use and income of his real estate, one-half to P., the other half to I., during life, but in either case not to exceed twenty years from the testator's death. In case I. died before the expiration of the twenty years the "use and income" of his half, was given "to the eldest male issue * * * then surviving" of T. and A. In case I. survived the twenty years the whole of the real estate was given to him on condition that he pay certain legacies; if he died before the expiration of the twenty years the real estate was devised to "the eldest male issue" of T. and A. upon the same condition and subject to the interest given to P. His residuary estate the testator gave to his executors upon certain trusts and upon the expiration thereof to beneficiaries named. P. died three years after the testator. I. died thereafter and within the twenty years; at his death T. and A. had no issue living, but thereafter a son was born to them. In an action for the construction of the will, *held*, that as T. and A. had no male issue living at the time of death of I., the devise to their "eldest male issue" lapsed, and the real estate went, not to the heirs of the testator, but into the residuary estate and passed under the residuary clause.

(Argued December 21, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 11, 1893, which affirmed a judgment construing the will of Isaac Smith, deceased, entered upon a decision of the court on trial at Special Term.

The nature of the action, and the facts, so far as material, are set forth in the opinion.

Josiah T. Marean for appellant. The action will lie. (Code Civ. Pro. § 1866; *Anderson v. Anderson*, 112 N. Y. 112; *Adams v. Becker*, 47 Hun, 65; *Drake v. Drake*, 41 id. 366, 372; 134 N. Y. 220; *Read v. Williams*, 125 id. 566.) Issue in this will means children. (*Palmer v. Horn*, 84 N. Y. 519; *Soper v. Brown*, 136 id. 249; 2 Jarman on Wills [5th Am. ed.], 639; 3 id. 236, 237.) There can be no doubt that under the devise in question the eldest son is to be sought, not at the testator's death, but at the death of Isaac Smith, 2d. (*Jones v. Colbeck*, 8 Ves. 38; *Delaney v. McCormack*, 88 N. Y. 174; *Hobson v. Hale*, 95 id. 614; *Smith v. Edwards*, 88 id. 104.) A devise to a person answering a certain description does not fail because no person is *in esse* answering the description when the devise, but for that fact, would vest (whether in interest merely or in possession), but if the description is such that he may yet come *in esse* the gift awaits his advent, vesting immediately in the first object which thereafter comes *in esse* bearing the prescribed marks of identity, heirs or residuary devisees taking in the interim. (1 Jarman on Wills [5th Am. ed.], 598, 599; 2 id. 721, 725, 728, 729, 730, 782; *Godfrey v. Davis*, 6 Ves. 43; *Wyndham v. Wyndham*, 3 B. C. C. 58.) The question is whether, in the gift of the *corpus*, the words "then surviving," though not expressed, are to be understood and interpolated. The verbal connection between this gift and the prior gift of the use and income of one-half is not such as to require or warrant such interpolation. (*Patchen v. Patchen*, 121 N. Y. 432; *Mullarkey v. Sullivan*, 136 id. 227; *Jennings v. Conboy*, 73 id. 230, 237; *Manox v. Greener*, L. R. [14 Eq.] 456; *Siewart v. Garnett*, 3 Sim. 398.) The court below did not dissent from the interpretation of the devise contended for, but while admitting that the testator intended the devise to await the advent of a son, if there was none *in esse* at the death of Isaac, 2d, held it void for the reason that it suspended the absolute power of alienation for more than two lives. That proposition is untenable. (*Crooke v. County of Kings*, 97 N. Y. 421, 436; *Provost v. Provost*, 70 id. 141.)

George M. Baker for appellant. The devise over upon the death of Isaac Smith, 2d, must fail. (1 R. S. 722, §§ 14, 15.) The devise over upon the death of Isaac Smith, 2d, failing, the fee descended to the heirs at law and did not pass to the residuary legatees. (*Lamb v. Lamb*, 131 N. Y. 234; *Kerr v. Dougherty*, 79 id. 348; *Bowditch v. Ayrault*, 138 id. 229.)

Thomas Young for respondents. If the testator referred to a male child to be born after the death of the devisee, Isaac Smith, 2d, then the effect of such construction is that the estate is tied up for an indefinite period not measured by specified lives, and is, therefore, void. (*Purdy v. Hayt*, 92 N. Y. 456; *Schettler v. Smith*, 41 id. 334; *Taylor v. Gould*, 10 Barb. 398; *Burrill v. Boardman*, 43 N. Y. 259; *Bradley v. Kulm*, 97 id. 35.) The residuary clause carries the void devise the same as it would a lapsed legacy. (*Cruikshank v. Ilome, etc.*, 113 N. Y. 338; *In re Crossman*, Id. 510; *In re Bonnet*. Id. 524.)

EARL, J. This action is for the construction of the will of Isaac Smith, deceased, and the clauses to be construed are the following:

"*Twentieth.* I give and bequeath to said Sarah A. Parish the use and income of the one equal half of all the real estate that I may die seized of, during her life, but not to exceed the full term of twenty years after my death, and it is my will that the said Sarah A. Parish shall cut no more wood off of said premises than will be necessary to keep the buildings and fence in good repair.

"*Twenty-first.* I give and bequeath to Isaac Smith, the son of my nephew, Thomas Smith, the use and income of the remaining one equal half of my real estate during his life, but not to exceed the full term of twenty years after my death; it is my will that the said Isaac Smith shall not cut any more wood off of the premises than will be necessary to keep the buildings and fence in good repair. And in case the said Isaac Smith should chance to die before the expiration of twenty years after my death, I give the use and income of said last-mentioned

half part of my real estate to the eldest male issue of Thomas and Anna Smith then surviving, and if it so be that the said Isaac Smith does live for the full term of twenty years after my decease, then and in that event, I give, devise and bequeath the whole of my real estate to the said Isaac Smith, upon the condition that he pays to his surviving brothers and sisters and their issue in equal shares the sum of three thousand dollars, the issue to take their parent's share. In case the said Isaac Smith should die before the expiration of the said twenty years after my decease, I then and in that event give, devise and bequeath the said farm and real estate to the eldest male issue of Thomas and Anna Smith, upon the same conditions with reference to the charge of three thousand dollars, and subject to the estate herein given to Sarah A. Parish.

"All the rest, residue and remainder of my estate I give and bequeath to my executrix hereinafter named and her successor and successors in trust, to invest in such securities as are considered safe and proper for trustees, and out of the income thereof first to apply to the use of Sarah A. Parish and Isaac Smith, and the survivor of them, but not to exceed the term of twenty years after my decease, such sum as may suffice for the payment of all taxes and assessments which may be levied on my said farm and real estate from time to time during the period of the estate hereby given to the said Sarah A. Parish and Isaac Smith, and also the sum of three hundred dollars per annum for the purpose of purchasing manure to be used on said farm, and all necessary and proper sums of money to keep the buildings and improvements on said farm and real estate in good tenable order and repair; and second to apply the residue of said income annually in equal shares to the use of the children of Thomas Smith and Daniel W. Smith, in equal shares annually, until the death of Sarah A. Parish and Isaac Smith, when this trust shall end and terminate unless sooner terminated by the twenty years' limitation above declared. Upon the death of the said Sarah A. Parish and Isaac Smith, or sooner determination of the trust hereinbefore created, I give and bequeath my said residuary estate in equal

shares to the children of my nephews, Thomas Smith and Daniel W. Smith, who may be then living, and to the issue of any of such children who may then be deceased, such issue taking his or her parent's share."

The testator died June 28th, 1878, Sarah A. Parish died December, 1880, and Isaac Smith died May 27th, 1890. At the latter date Thomas and Anna Smith had no issue living, and their eldest son, thereafter born, is the appellant Thomas Isaac Smith, who was born March 13th, 1892. He claims all the real estate as devisee thereof on the ground that he is the eldest male issue of Thomas and Anna Smith. The appellants Thomas and Daniel W. Smith are nephews of the testator, and, as such, his only heirs at law and next of kin, and they claim that the devise of the real estate upon the death of Isaac Smith lapsed; that it did not pass to their children under the residuary clause; that the testator died intestate as to it, and that they take the whole of it as heirs and next of kin. The respondents are the residuary devisees, and they also claim that the devise of the real estate upon the death of Isaac lapsed, and that it passed to them under the residuary clause, and the court below has upheld their claim, and, we think, correctly.

Sarah A. Parish having died within twenty years after the death of the testator, the provision for her needs no attention now. Isaac Smith was to have the use of one-half of the real estate for his life, but not exceeding the term of twenty years. If he died within the term the use of the one-half of the real estate given to him was to go to "the eldest male issue of Thomas and Anna Smith then surviving." If he survived the term then he was to have the whole of the real estate, and if he died during the term then the whole of the real estate was to go "to the eldest male issue of Thomas and Anna Smith." We think the testator had reference to the same person and the same time in the two clauses when he speaks of the eldest male issue surviving and the eldest male issue. He did not mean, upon the death of Isaac within the term, to give the income to one person to be ascertained at a definite time, and

the *corpus* to another person to be ascertained at another future and uncertain time. He had in mind a definite time when the estate was to vest, and did not mean that at the death of Isaac the real estate was to vest as intestate property in his heirs or under the residuary clause in the residuary devisees, and then at some uncertain and perhaps distant time to be divested, and vest in male issue then born. If he had so intended, he would probably have made some provision for the disposition of the real estate intermediate the death of Isaac and the birth of male issue of Thomas and Anna Smith. It is a very obvious and natural construction of all the language used to read it as if the words "then surviving" were repeated in the second clause after the words "Thomas and Anna Smith."

Therefore, as Thomas and Anna Smith had no male issue at the death of Isaac, there was no one to take the devise and it lapsed. What became of it? Clearly it passed under the residuary clause. It is a general, sweeping residuary clause, and carries everything not before effectually disposed of. (*Cruikshank v. Home, etc.*, 113 N. Y. 337; *Matter of Crossman*, Id. 503; *Matter of Bonnet*, Id. 522.) Such is the general rule, and we should not, by engrafting exceptions upon it, or by subtle refinements and distinctions, render the construction of wills difficult and uncertain, and the rule should have full effect unless the testator by the language he uses manifests a plain intention to curtail its operation. The expectations of a testator and his intentions may be two different things. He never expects that any of the dispositions of his will are void, and he rarely expects that any of the devises and bequests will lapse. But when he attempts to dispose of all the property he may own at his death he never intends to die intestate, and he intends that a general residuary clause shall carry whatever as matter of fact or of law is not otherwise disposed of.

Our conclusion, therefore, is that the judgment should be affirmed, without costs to any party in this court.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

BARCLAY HAVILAND, Respondent, v. MARTHA T. WILLETS et al.,
Appellants.

141	85
149	488

141	85
160	589

While a party to a written instrument may not invoke the aid of a court of equity because of a mistake of law on his part, where there is no improper conduct on the part of the other party, where the mistake on his part is shown, and also either positive fraud or inequitable, unfair and deceptive conduct on the other side, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief.

H. died leaving the plaintiff his sole heir and next of kin him surviving, and leaving a will by which he gave a legacy to plaintiff, and his residuary estate to two persons named, one-half to each. One of these died before the testator, leaving two children; the other was executor under the will and the sole surviving executor. Plaintiff was, at the testator's death, seventy-three years of age. Both he and the executor believed at the time of the reading of the will that the share of the residuary legatee who had died went to his children. The executor then proposed to give plaintiff a sum specified, he to release all his interest in the estate. Before, however, an agreement was perfected, the former discovered that such legacy had lapsed and that the share went to plaintiff. Without disclosing this the executor drew up an agreement of release which contained no statement of the facts; this plaintiff signed. Subsequently the executor took plaintiff to his counsel, and there plaintiff executed a more formal instrument, which recited the death of said residuary legatee and the desire and intention of plaintiff to relinquish to the children of the deceased legatee all the rights and interests acquired by him as heir at law and next of kin, and by which, in consideration of payment of the sum agreed upon, he released and discharged such interests and authorized payment thereof to said children. In an action to set aside said release it appeared that it was read at the time it was executed, and that the counsel stated, after the release was signed, that by the lapse of the legacy, the ownership thereof vested in plaintiff; this statement was couched in legal terms, and plaintiff testified that he did not hear the statement either of counsel or as read. *Held*, that a question of fact was presented, and this court could not dispute a finding that plaintiff did not know his legal rights when he executed the release; and that, as the evidence showed a studious concealment from plaintiff by the executor, in whose position and ability the former reposed some confidence, of the precise point essential to his free and intelligent action, it was competent for a court of equity to cancel the release, so far as lawful payments had not been made under it.

The executor died, and two days thereafter plaintiff was fully advised of his legal rights; for three years he remained silent, without

revoking the release, giving any notice of change of intention, or making any complaint, although knowing that the estate was being administered in accordance with it. During the three years large sums were paid to said children out of the estate by the administrators with the will annexed. *Held*, that plaintiff was estopped from recovering back said sums either from said administrators or the persons to whom they were paid; but was entitled to an accounting and to payment of the amount of said residuary share, less the amount paid to plaintiff over and above his legacy and the sums so paid to the children of the deceased legatee.

Haviland v. Willets (87 Hun, 89), reversed.

(Argued December 15, 1898; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which denied a motion for a new trial and affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to set aside a release executed by plaintiff of his interest in the estate of Isaac E. Haviland, deceased, and for an accounting by the administrators with the will annexed of said Haviland, and a determination of the amount due plaintiff as his legatee, heir at law and next of kin, and such other and further relief as might be just and proper.

The following is a copy of the release:

"KNOW ALL MEN BY THESE PRESENTS, that WHEREAS, Isaac E. Haviland, late of the Town of Oyster Bay in the County of Queens and State of New York, departed this life in said Town on the twenty-ninth day of November in the year 1885, leaving a last Will and Testament bearing date the fifteenth day of March in the year 1855, which was duly proved and admitted to probate by and before the Surrogate of the County of Queens on the Eighth day of December in the year 1885 and letters testamentary thereunder were on said last-mentioned day duly granted and issued by said Surrogate to Stephen Taber, the sole surviving Executor in said Will named;

"And, WHEREAS, Barclay Haviland of Millbrook, in the county of Dutchess, is the sole heir at law and next of kin of the said Isaac E. Haviland, deceased;

“And, WHEREAS, the said testator in and by said will, did, after making certain bequests therein set forth, including a legacy of two thousand dollars to the said Barclay Haviland, devise and bequeath the rest, residue and remainder of his estate, real and personal, to his nephews, Stephen Taber and Samuel T. Taber, in equal shares ;

And, WHEREAS, the said Samuel T. Taber died in the lifetime of said testator, leaving him surviving two children, Martha T. Willets and S. Phebe Taber Willets, his only issue ;

“And, WHEREAS, the greater part of the estate and property owned by the said Isaac E. Haviland at the time of making said will, came to him on the part of his wife, Ruth Titus Haviland, who was related by blood to the said Stephen Taber and the said Samuel T. Taber, and it was the intention of the said testator in making his said will to devise and bequeath to the said Stephen Taber and Samuel T. Taber that part of his estate which so came to him from his said wife, with such further increase and accumulations thereof as might accrue and come to his hands ;

“And, WHEREAS, it is the desire and intention of the said Barclay Haviland to carry into effect in all respects the intentions of said Isaac E. Haviland, as above recited, and which are well known to him to be as aforesaid, and to waive, relinquish and give up any and all right, title and interest which he may have acquired in the estate, real and personal of said deceased as such heir at law and next of kin by reason of the death of the said Samuel T. Taber, as aforesaid, to the end that the said surviving children of the said Samuel T. Taber may in all respects receive the same estate, rights and interests in the estate of said testator as they otherwise might have, had they been named as substituted residuary devisees and legatees in said will in the place and stead of their said father in the event of their said father dying in the lifetime of the said testator ;

“And, WHEREAS, an appraisement of all the estate, real and personal, whereof the said Isaac E. Haviland died seized or

possessed, has been made by the said Stephen Taber and submitted to and accepted by the said Barclay Haviland, and has been mutually agreed upon by and between the parties hereto, to be for the purposes of this instrument and the settlement of the estate of said testator, the sum of one hundred and ninety thousand dollars ;

“And, WHEREAS, it has been determined by the said Barclay Haviland, and agreed by and between him and the said Stephen Taber, individually, and as executor as aforesaid, that the said Barclay Haviland shall take and receive one-tenth part of the said estate, real and personal, at the valuation and appraisement aforesaid, subject, however, to the payment of the general and specific legacies given by said will (excepting the legacy therein given to said Barclay), the commissions of said executor, and the expenses attending the administration of said estate, in full for his rights and interest in said estate ; and that the residue of said estate, subject to the payments and deductions aforesaid, shall be divided and distributed as follows : One-half thereof to the said Stephen Taber, and one-quarter thereof to each of the said Martha T. Willets and S. P. Taber Willets, to be received and held by them absolutely as their own property, free from any and all claim of the said Barclay Haviland, his heirs, executors or administrators thereto ;

“And, WHEREAS, the said Barclay Haviland is about to grant, release and convey to the said Stephen Taber, by deeds of conveyance bearing even date herewith, all his right, title and interest of, in and to any and all real estate whereof the said Isaac E. Haviland died seized, possessed or entitled to, and to release and convey to the said Stephen Taber, as executor as aforesaid, all his, said Barclay Haviland's, right, title and interest in and to all of the personal property and estate whereof the said Isaac E. Haviland died possessed and entitled to, saving and reserving only to the said Barclay Haviland the said one-tenth part of said estate at the agreed valuation and appraisement above recited, and subject to the payments and deduction from said estate hereinabove referred to, to the end

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that the said residue of said estate of said testator, real and personal, then remaining shall be divided and distributed among the said Stephen Taber and Martha T. Willets in the manner and in the proportions aforesaid, which division and distribution among such last-named persons the said Barclay Haviland hereby requests and directs the said Stephen Taber to make, both individually and as such executor shall and will make, but only upon such request and direction and upon the faith of this instrument, the statements herein recited and such request and direction ;

“ And, WHEREAS, the said Stephen Taber, as such executor, in part performance of the agreement and understanding above recited and set forth, has this day paid and transferred to the said Barclay Haviland the cash and securities, and the said Barclay Haviland has accepted the sum of eighteen thousand dollars as part of the said one-tenth part of the estate of the said Isaac E. Haviland, deceased, and the said Stephen Taber, individually and as such executor, has agreed to account for and pay over to the said Barclay Haviland the balance or remainder of such one-tenth part, subject to the deduction and payments aforesaid, upon or before the final division and distribution of such estate to be made as aforesaid between the said Stephen Taber and the said Martha T. Willets and S. Phebe Taber Willets ;

“ Now, THEREFORE, this instrument witnesseth, that the said Barclay Haviland, in consideration of the above-recited prentises and of the sum of one dollar to him in hand paid by the said Stephen Taber, individually and as executor of the last will and testament of Isaac E. Haviland, deceased, the receipt whereof is hereby acknowledged, has remised, released, assigned and transferred, and by these presents doth for himself, his heirs, executors and administrators remise, release, assign and transfer to the said Stephen Taber, as such executor as aforesaid, all right, title and interest, claim and demand of the said Barclay Haviland of, in and to any and all of the personal property and estate whereof the said Isaac E. Haviland died possessed or in any way entitled to, of what nature

or kind, wheresoever situated, to have and to hold the same unto the said Stephen Taber, as such executor, and his successors for the purpose of distribution between himself and the said Martha T. Willets and S. Phebe Taber Willets in manner and form hereinabove recited and set forth.

“And for the consideration aforesaid the said Barclay Haviland hath remised, released and forever discharged, and by these presents doth remise, release and forever discharge, the said Stephen Taber, both individually and as such executor, his heirs, executors, administrators and successors, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues and sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, premises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which, against the said Stephen Taber, either individually or as such executor, the said Barclay Haviland ever had, now has; or which his heirs, executors or administrators hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and particularly arising and growing out of the estate, real and personal, or either, whereof the said Isaac E. Haviland died seized or possessed or entitled to, and the administration, settlement, disposition and distribution of said estate, real and personal, or either, saving and reserving, however, only to the said Barclay Haviland, his executors or administrators, the balance remaining due or unpaid to him of the said one-tenth part of said estate at the appraisement and valuation aforesaid, subject to the payment from said estate of the general and specific legacies and commissions of said executor and the expenses of administration as aforesaid, and which balance so remaining of said one-tenth part of said estate, subject as aforesaid, the said Stephen Taber, individually and as such executor, hereby agrees to account for and pay over to the said Barclay Haviland.

“In witness whereof the parties hereto have hereunto set

their hands and seals this eighteenth day of March, in the year one thousand eight hundred and eighty-six.

“BARCLAY HAVILAND. [L. s.]

“STEPHEN TABER,

“Individually and as Executor. [L. s.]”

The material facts are stated in the opinion.

John R. MacArthur and *Wm. H. Arnoux* for appellants. All the equities in the case are in defendant's favor. (R. S. [8th ed.] 2549, § 524.) The plaintiff, having duly executed the agreement and release, was bound by its recitals and the agreement therein made, and cannot now be heard to plead his own ignorance of any of the facts therein contained. (*Upton v. Tribblecock*, 91 U. S. 45; *School Dist. v. Stone*, 106 id. 183; *Bowman v. Taylor*, 2 Ad. & El. 278; *Green's Appeal*, 97 Penn. St. 342; *Redwood v. Tower*, 28 Minn. 45; *Lucas v. Beebe*, 88 Ill. 427; *Usnia v. Wilder*, 58 Ga. 178; *Glenn v. Statler*, 42 Iowa, 107; *Butman v. Hussey*, 30 Maine, 263; *Hill v. Bush*, 19 Ark. 522; *Henderson v. Dickey*, 35 Mo. 120; *Gilbert v. Martin*, 119 N. Y. 298; *Hobbs v. City of Yonkers*, 102 id. 13; *Pindar v. R. F. Ins. Co.*, 47 id. 114.) As matter of law the finding that the plaintiff executed said instrument under a mistake of fact is incorrect, being wholly unsupported by the evidence in the case. But if it were so a mistake of fact made by plaintiff alone does not warrant a court of equity to interfere. (*Roberts v. Tobias*, 120 N. Y. 1; *Tomplin v. James*, L. R. [15 Ch. Div.] 215; *Jenkins v. C. C. Co.*, 48 N. W. Rep. 970; *Crowder v. Langdon*, 3 Ired. Eq. 476; *Goddard v. Jeffreys*, 51 L. J. Ch. 59.) Assuming, for the purpose of argument, that the plaintiff executed said instrument without knowledge of his rights, and would not have executed the same if he had known them, and it having been found that Stephen Taber did know the same, the case presents a mistake of law on the part of the plaintiff only, from which a court of equity cannot relieve him. (*Zollwan v. Moore*, 21 Gratt. 313; *Bilbie v. Lumley*, 2 East, 469; *Brisbane v.*

Dacres, 5 Taunt. 144; *Allen v. G. A. Ins. Co.*, 123 N. Y. 6; 2 Pem. Eq. Juris. 843; *Lyman v. U. Ins. Co.*, 17 Johns. 373; *Crozier v. Acre*, 7 Paige, 137; *Trigg v. Read*, 5 Humph. (Tenn.) 529, 533; *Vanderbeck v. City of Rochester*, 122 N. Y. 285; *Pooley v. City of Buffalo*, Id. 592; *Moran v. McLarty*, 75 id. 25.) The acquiescence of the plaintiff in the payments made, with full knowledge of all the facts, constitutes in law a ratification of the agreement for such payments, and he is estopped from rescinding the same. (*Rogers v. Ingham*, L. R. [3 Ch. Div.] 351.) Equity will not relieve a party against his own mistakes so far as the rights of others have become vested and the contract executed. (*Queen v. Lords of Treasury*, L. R. [16 Q. B.] 357; *Brisbane v. Dacres*, 5 Taunt. 144; *Dain v. U. S.*, 10 Wall. 1; *Zollman v. Moore*, 21 Gratt. 313; *Lamb v. Harris*, 8 Ga. 546; *Had-dock v. Williams*, 10 Vt. 570; *Nobours v. Cocke*, 24 Miss. 44; *Essex v. Day*, 52 Conn. 483; *Montgomery Co. v. A., etc., Co.*, 47 Iowa, 91; *Mays v. Dwight*, 82 Penn. St. 462; *Miles v. Stevens*, 3 id. 21; *W., etc., Bank v. F., etc., Bank*, 10 Bush, 699; *Nicholson v. Janeway*, 16 N. J. Eq. 285; *McFarran v. Taylor*, 3 Cranch [U. S.], 270; *Weaver v. Carter*, 10 Leigh, 37; *Segur v. Tingly*, 11 Conn. 134; *Trigg v. Read*, 5 Humph. 529; *Harrod v. Cowan*, Hardin, 551; *U. Ins. Co. v. Alleghany*, 101 Penn. St. 250, 253-255; *Paine v. Jones*, 75 N. Y. 593; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Story v. Conger*, 36 N. Y. 673; *Nevins v. Dunlap*, 33 id. 676; *Mead v. Ins. Co.*, 64 id. 453; *Moran v. McLarty*, 75 id. 25, 28, 29; *Stoddard v. Hart*, 23 id. 556, 562; *Lyman v. U. S. Ins. Co.*, 17 Johns. 373; *Wells v. Yates*, 44 N. Y. 525, 529; *Thomas v. Bartow*, 48 id. 193; *Prior v. Williams*, 3 Abb. Pr. 624; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Boon v. Schrenkeisen*, 110 id. 55, 59; *Avery v. E. L. Co.*, 117 id. 451; *Dennerlein v. Dennerlein*, 111 id. 518; *Jacobs v. Moranque*, 47 id. 57; *Weed v. Weed*, 94 id. 243; *Flynn v. Hurd*, 118 id. 19; *Pooley v. City of Buffalo*, 122 id. 592; *Vanderbeck v. City of Rochester*, Id. 285; *Tripler v. Mayor*, 125 id. 617, 630; *Allen v. Ins. Co.*, 123 id. 6, 12.)

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To entitle a party to relief from a mistake, it is necessary that the mistake should have been in reference to a material fact, and further that such mistake should have determined the conduct of him by whom it was made, and that the act done would not have been done but for such mistake. (*Dambman v. Schulting*, 75 N. Y. 55, 63; 85 id. 622; *Stutheimer v. Killip*, 75 id. 282; *Segur v. Tingley*, 11 Conn. 134, 143; *McFarren v. Tingley*, 3 Cranch, 270, 281.) Unless the plaintiff has alleged and proved either (1) a mutual mistake, or (2) fraud on the part of defendants, he cannot recover. Under the findings as made by the trial judge there must be a new trial. (*Bonnell v. Griswold*, 89 N. Y. 122; *Conselyea v. Blanchard*, 103 id. 222; *Kelly v. Leggett*, 122 id. 633; *Schwinger v. Raymond*, 83 id. 192.)

Guy C. H. Corliss and *Frank B. Lown* for respondent. The executor having previously stated to the plaintiff that the part of the estate in question went to the two daughters of Samuel Taber, deceased, it was fraud in him, on ascertaining the plaintiff's rights thereto, not to apprise him concerning them. (2 Pom. Eq. Juris. § 888; *Reynell v. Sprye*, 1 De G., M. & G. 660.) Assuming that Barclay Haviland executed the paper in question without knowledge that the legacy to Samuel Taber had lapsed, and without knowledge that he, as next of kin, was entitled to the same, this constituted a mistake of fact. (2 Pom. Eq. Juris. 305, 317, § 849; *Cooper v. Phibbs*, L. R. [2 H. L.] 149-170; *Landsdowne v. Landsdowne*, 2 J. & W. 205; *Freeman v. Curtis*, 51 Maine, 140; 1 Story's Eq. Juris. [13th ed.] 183; *Blakeman v. Blakeman*, 39 Conn. 320; *Broughton v. Hutt*, 3 De G. & J. 501-504; 1 Beach Mod. Eq. Juris. §§ 37, 38.) Even if it should be considered a mistake of law, the plaintiff would not be without remedy. (2 Pom. Eq. Juris. § 847; 1 Beach Mod. Eq. Juris. §§ 38, 41, 47; *Schnell v. Ins. Co.*, 98 U. S. 85; *Canedy v. Massey*, 13 Gray, 373; *Kornegay v. Everett*, 5 S. E. Rep. 418; *Benson v. Markoe*, 37 Minn. 30; *G. B. & M. C. Co. v. Hewett*, 22 N. W. Rep. 216; *Bush v. Merriman*, 87

Mich. 260; *Pitcher v. Hennessy*, 48 N. Y. 415; *Griswold v. Hazzard*, 141 U. S. 260; *Griffiths v. Townley*, 69 Mo. 13; *Cooper v. Phibbs*, L. R. [2 H. L.] 149; *Blakeman v. Blake-man*, 39 Conn. 320; *Reynell v. Sprye*, 8 Hare, 222-255; *Boyd v. De La Montagnie*, 73 N. Y. 498, 503, 504; *Busch v. Busch*, 12 Daly, 476; 102 N. Y. 672; *Stedwell v. Anderson*, 21 Conn. 139; *Fitzgerald v. Peck*, 4 Litt. 125; *Underwood v. Brockman*, 4 Dana, 309; *Conrad v. Hughes*, 1 K. & J. 443; *Ramsden v. Hylton*, 2 Ves. 304; *Ray v. Bank of Kentucky*, 3 B. Mon. 510; *Baughton v. Hutt*, 3 De G. & J. 501; *Lawrence v. Banbien*, 2 Bail, 623; *Northrop v. Graves*, 19 Conn. 548; *Baker v. Massey*, 50 Iowa, 399; *Gratz v. Reed*, 4 B. Mon. 190; *Culbreath v. Culbreath*, 7 Ga. 64.) The failure on the part of Taber, who knew of the lapsing of the legacy, to disclose the same to the plaintiff, was a fraud in law. (2 Pom. Eq. Juris. §§ 955-963; *In re Smith*, 95 N. Y. 516; *Dabman v. Schulting*, 75 id. 55; *Cowee v. Cornell*, 75 id. 91, 99, 100; *Green v. Roworth*, 113 id. 462; *Sears v. Schafer*, 6 id. 268-272; *Meyers v. Lathrop*, 73 id. 315-321; *Gardinier v. Gabriel*, 110 id. 650; *Murray v. Marshall*, 94 id. 617; *E. C. F. Co. v. Hersee*, 103 id. 25; *Oberlander v. Speiss*, 45 id. 175-179; *Parker v. Baxter*, 86 id. 586.) The relation of executor and distributee existing between the executor and the plaintiff was a fiduciary relation. (2 Pom. Eq. Juris. § 963; 1 Bigelow on Fraud, 341; 1 Perry on Trusts, 203, 204, § 178; *Statham v. Ferguson*, 25 Gratt. 28; Willard's Eq. Juris. 170; *Billage v. Southee*, 9 Hare, 534, 540; *Green v. Roworth*, 113 N. Y. 462; *Cowee v. Cornell*, 75 id. 91, 101; *Sears v. Shaefer*, 6 id. 268-272; 1 Beach Mod. Eq. Juris. §§ 114, 125, 126.) Surprise is a sufficient ground for relief from a mistake of law. (1 Story's Eq. Juris. 129, 143; 2 Pom. Eq. Juris. §§ 847-850.) The appellants assert that equity will not relieve the plaintiff, because the rights of the two daughters have become vested. This is untenable. (*Ranken v. Patton*, 65 Mo. 378-415; *Yosti v. Lanahan*, 49 id. 599; *Whelan v. Whelan*, Id.; 1 Beach Mod. Eq. Juris. § 116; *Bridgeman v. Greene*, 1 Wilm. 64; 2

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Ves. 627; *Huguenin v. Baseley*, 14 id. 279.) The plaintiff was not guilty of such negligence in not understanding that he had rights from vague recitals, or from the fact that the instrument purported to convey an interest in the estate as will defeat him. (2 Pom. Eq. Juris. § 856; *Smith v. Smith*, 134 N. Y. 62-65; *A. C. S. Inst. v. Burdick*, 87 id. 40-46.) It was not necessary for the plaintiff to offer to restore the money received by him before bringing the suit. (*Allerton v. Allerton*, 50 N. Y. 670; *Gould v. C. C. N. Bank*, 99 id. 333-337; *I. & T. N. Bank v. Peters*, 123 id. 272, 279.)

FINCH, J. The instrument which equity is asked to cancel and set aside as the deserved relief in this action is a long document, carefully and thoughtfully prepared, loaded with estopels as the product of numerous recitals, and revealing everything essential to the intelligent action of the plaintiff, except the one single truth which was the most vital of all. That was left to a possible inference, which, it is true, a man of ordinary ability ought to have drawn; which this plaintiff, if attentive and not negligent, might have easily drawn; but which, according to his evidence and the findings of the trial court, utterly escaped his observation. We are required, therefore, to assume, however doubtful the proposition may seem to any of us to be, that he signed the agreement in ignorance of his actual rights, and through a mistake either of law or of fact. The circumstances surrounding his action are somewhat unusual, and while in the main undisputed, are yet in many directions open to doubts and conflicting inferences which for us must be solved by the findings.

Isaac E. Haviland married Ruth Titus in 1825. At that time he was worth but a small amount, while his wife had property of her own valued at about thirty-six thousand dollars. No children were born of the marriage, and in 1850 the wife died, leaving a will by which she gave all her property to her husband. It is a natural supposition that the gift may have been the subject of consideration between the two before that will was made, and that the wife, preferring her

husband to the total exclusion of her kindred, may have expressed some wish that in the end it should go back to them. At all events a conviction of the justice and propriety of such a result became firmly fixed in the mind of the husband, for after his wife's death he explained to his father and his brother, who is the present plaintiff, his intention to give substantially the property which came from his wife to her relatives, and made his will in 1855 upon that basis. At such date he was worth about forty thousand dollars, of which he gave to his father two thousand dollars, and to this plaintiff also two thousand dollars, and beyond a few small legacies, bequeathed the entire residue to his wife's two nephews, Stephen Taber and Samuel Taber. Within a few years thereafter the testator became insane. In 1860 Samuel Taber was appointed committee of his estate, but himself died while the lunatic was living, so that the share bequeathed to him in the will of Isaac lapsed and became undisposed of by that instrument. Samuel left two daughters, Martha Willets and Phebe Willets, who were his sole heirs and next of kin, and who are made parties defendant in this action. Upon the death of Samuel Taber the care of the lunatic's property was given to Stephen as committee, and he so managed the estate that it increased from forty thousand dollars to almost one hundred and eighty thousand dollars during the life of the testator. How this increase was accomplished we do not know, but even if favored by fortunate changes of values, it either arose from the care and judgment of the wife's relatives, or from a proportionate increase in the value of the property which came from her. In 1863 the testator's father died, and in 1885 the testator himself died, leaving his brother, Barclay Haviland, his sole heir at law and next of kin, and as such entitled to take the whole of the legacy to Samuel which lapsed by his death during the life of the testator, and upon that ownership Barclay stands as plaintiff in this action.

Soon after the funeral the plaintiff, accompanied by his daughter, Mrs. Otis, went with Stephen Taber to the trust company in whose custody the will had been placed and there

read it. Stephen Taber by its terms had become the sole surviving executor. He was a man of conceded business ability, and had been the committee of the deceased, becoming thereby fully acquainted with the situation and amount of all his property. He naturally represented the wife's kindred, of whom he was one, but as executor owed the duty of impartial justice to the legatees as between each other whenever his conduct necessarily affected their relative rights. The plaintiff is described as an "old farmer," and so entitled to some degree of judicial sympathy. His age was seventy-three: in his own right he was poor: but nothing indicates that he possessed less than the average ability of the farming population, which it is not necessary to underrate. For the trouble which arose did not so originate, but sprang from unfamiliarity with legal doctrines and legal rules which in the beginning equally misled both parties. It is not at all doubtful that at the reading of the will both Barclay and Stephen mistakenly supposed that the one-half of the residue bequeathed to Samuel passed to his two daughters, and neither suspected that in truth the whole of it, amounting to almost eighty thousand dollars, was the absolute property of the plaintiff by reason of the lapse which had occurred. At that time in the course of the conversation relating to the will Stephen said that Samuel's share would go to his children and they would represent him. That was the belief of all parties honestly indulged, and its confirmation by Stephen, speaking of it as a matter of course, tended necessarily to prevent any doubt on the subject from entering the mind of the plaintiff. From that time on the mistake operated upon and to some extent controlled his action. Stephen, however, was quick to see how the great increase in the value of the property, had made the testator's scheme of distribution quite inequitable relatively to his known and declared intentions. Some part of the increase was the product of that portion of the estate for which the testator was not indebted to the bounty of his wife, and if his insanity had not intervened he himself probably would have changed the will so as

to meet the changed conditions. The will was not yet proved. How early insanity began might become a troublesome question; and both prudence and justice dictated to Stephen a distribution more favorable to plaintiff, and he accordingly proposed that since at the date of the will nine-tenths of Isaac's property had come from his wife and one-tenth only from his own effort, the increase should be called one hundred and fifty thousand dollars, and that should be divided in the same proportions. This proposal gave to the plaintiff fifteen thousand dollars, and adding to that, as was promised, the two legacies to his father and himself, made him the possessor of nineteen thousand dollars, which for him was a fortune. He did not at the time make any answer. Why he did not accept at once is possibly explainable upon the theory that he desired a more liberal division and hoped to get a better one if he should be slow in its acceptance, but whatever he obtained beyond his legacy he looked upon as bounty bestowed upon equitable considerations, and did not suspect for a moment that he was legally entitled as his own to all that was offered and three times as much in addition.

The mistake common to both soon became the mistake only of one. The findings show that the executor knew the legal consequences of the death of Samuel when the final arrangement was made, but do not determine at what precise time he obtained that knowledge. It appears, however, that he took the will to his counsel, Judge Garretson, for probate; and the latter says that he expressed to Stephen an opinion that the legacy lapsed; that the latter was surprised and doubtful, and requested that the question should be examined; that such an examination was made and the result communicated to Stephen. The will was probated on December 8th, and it was more than three months thereafter before the parties met to resume a discussion of the ultimate distribution. We cannot escape the belief that at some time during this interval, and probably in its early days, Stephen knew the truth from the counsel he had employed. Having this knowledge, the executor sent for Barclay. Instead of disclosing

the very grave mistake which both had made, he drew a paper on the lines of his original proposition, but which contained no statement of the facts, made no revelation of the existing and vital mistake, left Barclay still in the dark, and was devoted solely to the desired distribution. To that the executor obtained plaintiff's signature, and, not yet contented, took him to his counsel to have the agreement firmly riveted by a more formal paper.

What followed furnishes the appellants with the facts upon which they ground their principal argument. They say that Barclay came into court with a falsehood in his mouth; that in his complaint he alleged that the paper which he signed was described to him as a mere receipt; that he did not read it, but signed it in reliance upon that statement; whereas in truth it was correctly read to him, and he was furnished with a copy to enable him to follow the reading, and was permitted to keep that copy in his own possession. So much is true, and the court has so found. It tends to discredit Barclay and requires that we accept his statements with some degree of caution. It is then added that the release as read to him recites the death of Samuel in the testator's lifetime; the consequent lapse of the legacy to him; the position of Barclay as sole heir and next of kin of the deceased; that it then in terms releases and gives up any right which has resulted to the plaintiff; that so it put him on his guard and warned him at least that he was parting with a possible right, and raised the duty of inquiry; that, beyond that, Garretson told him that by the lapse he, as heir and next of kin, was vested with the ownership of Samuel's legacy; and that the plaintiff without denying the fact answers only that he did not hear the statement; and so his claim of ignorance is improbable and unworthy of belief, and should not be allowed. The argument is quite strong, but fails of being conclusive because it does not take into account the point of view from which Barclay was all the time observing the proceedings, and his mental attitude towards what was transpiring before him. He was inattentive and even negligent, but it was because he

thought money was being given to him, that he was parting with nothing, that no diligence on his side was needed, and that all the precautions were required for the executor and to protect him in the arrangement. Bearing that in mind, we can see how Barclay could have run the gauntlet of the long recitals and of the counsel's legal opinion, without having his pre-conceived and settled notion of the situation shaken or dislodged. There is thus raised a question of fact, and we ought not, therefore, to dispute the finding that Barclay did not know his legal rights when he signed the release and the executor did.

Upon this state of facts it was competent for equity to cancel and set aside the release. I have narrated the details at some length in order that the basis of that conclusion may be clearly seen, and its doctrine may not be misinterpreted. Assuming, as counsel for the appellants contends, that Barclay's mistake was one of law, and that the general rule excludes equitable relief for such a mistake, when it is one of law pure and simple, and no other elements are present, it is still obvious that the doctrine does not cover the entire array of facts here disclosed. It is equally well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair and deceptive conduct, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. All the cases which deny a remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other. (*Silliman v. Wing*, 7 Hill, 159; *Flynn v. Hurd*, 118 N. Y. 26; *Vanderbeck v. City of Rochester*, 122 id. 285.) There was in this case evidence of a studious concealment of the precise point essential to the free and intelligent action of the plaintiff by the executor, in whose position and ability some confidence was reposed. No effort or suggestion was made by Stephen to rectify the mistake under which Barclay was acting, and even the statement of his counsel, made at the last minute, occurred after Barclay was already bound, was directed to Stephen and not to the

plaintiff, and was couched in legal terms, which the latter might not have apprehended even if he had heard them. And that he remained mistaken to the end is indicated by the fact that just before the release was read Barclay asked Stephen to intercede with Martha and Phebe to procure him a larger share, to which Stephen answered merely, "We will see about that." So that upon the facts there is evidence to support the finding of Barclay's mistake and the legal conclusion founded thereon. Much more should the rule we have asserted apply in a case where the release is utterly without consideration, and where its true legal effect is simply an authority by Barclay to Stephen to give away the former's property through ignorance on his part of his ownership.

But while we follow the courts below thus far, we cannot approve of the relief awarded to its full extent, and that for reasons which originate in Barclay's conduct after the execution of the agreement. Under it Stephen paid over to Barclay eighteen thousand dollars, and to Phebe Willets one thousand dollars, but died in April, 1886, without making further payments. Two days after his death the plaintiff was fully apprised by his own selected counsel of his entire legal rights, and no longer labored under any mistake either of fact or of law. Nevertheless, for more than three years thereafter, he remained utterly silent, never in any manner revoking the authority which he had given, knowing that the estate was being administered in accordance with it, and making no complaint of mistake or wrong, and giving no notice of any change in purpose or intention. After Stephen's death Thomas Taber and Martha Willets were appointed administrators with the will annexed, and paid over large sums, in pursuance of the agreement; to the two daughters of Samuel, without even an intimation from plaintiff of any objection or disapproval, and after Barclay had obtained a full knowledge of all his rights. There seems to be a disagreement between the court and the defendants' counsel as to the amount so paid, but whatever it be, we are of opinion that the plaintiff is estopped from recovering back

either from the administrators or from the persons to whom the payments were made, all sums paid after Barclay knew his rights, which he himself fixes as two days after Stephen's death, and covers all the payments made by the administrators. The agreement was his specific direction to those who were administering the estate to make the payments which they did make; if he intended not to be bound it was his duty to speak, and he had full opportunity to do so; silence misled to their harm both the administrators and the supposed legatees; the former made and the latter accepted the money as rightfully payable and due, and the one incurred risk and the other may have spent the money or changed modes of life in consequence, and certainly thereby incurred an unknown and unsuspected obligation, if required to return the fund. Under such circumstances the plaintiff is estopped from a recovery. The moment he learned his real rights it was his duty to speak, he had full opportunity to speak, and he knew that his silence would necessarily mislead the other parties to their harm. (*Erie Co. Sav. Bk. v. Roop*, 48 N. Y. 298; *Blair v. Wait*, 69 id. 113; *Viele v. Judson*, 82 id. 32; *The Queen v. Lords of the Treasury*, 16 Ad. & El. 357; *Brisbane v. Dacres*, 5 Taunt. 144.) Indeed, if the case should be reduced down to its simplest elements, and treated from the moment in which Barclay knew his rights on the basis of a mere gift which he had authorized the representatives of the estate to make out of his own share, he could not recover back from the donees the gift so far as executed. It cannot be that a gift voluntarily made, without mistake or fraud, can be at will recovered back; and from the day when Barclay knew that the lapsed share was his every payment made to Samuel's daughters was his payment because made by his direction and authority, with full knowledge of both law and facts, and by the assent of his silence during more than three years. We have been unable to see any ground on which the payments made after Stephen's death can be re-claimed. But the judgment covered the whole lapsed legacy, and possibly would have even invaded Stephen's rightful share. The case must go back for a re-trial. The

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plaintiff may then have judgment for the cancellation of the release, so far as lawful payments have not been made under it, and for so much of the residuary share bequeathed to Samuel as, on an accounting, is shown to be its amount, less the amount paid to plaintiff over and above his legacy, and less also the sums which have been paid before the commencement of this action to Martha and Phebe Willets by the administrators. The balance of the lapsed share remaining after those deductions is all that the plaintiff will be entitled to recover.

The order and judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except BARTLETT, J., not sitting.

Judgment reversed.

ALFRED A. BLAIR et al., Respondents, v. JAMES A. FLACK, as Sheriff, etc., Appellant.

Plaintiffs obtained an attachment against a corporation, which was placed in the hands of defendant, as sheriff, who, by virtue thereof, levied upon certain property of the corporation. A. claimed the property, and pursuant to an agreement between him, a clerk of one of defendant's deputies and plaintiff's attorney, A. gave a check as security for any judgment plaintiffs might recover, and thereupon the property was delivered up to him, and defendant drew the money on the check. A. commenced an action to recover the same, claiming that the property belonged to him and that the check simply took its place; he recovered judgment, which was paid by defendant. Plaintiffs were not made parties; they obtained judgment in the attachment suit, and having failed to collect, brought this action to recover the amount of the judgment. Defendant claimed, on appeal, that he was not liable for the contract made by the deputy's clerk; the authority was not denied but was assumed on the trial. *Held*, that the question could not be raised on appeal.

Plaintiffs put in evidence a copy of an affidavit claimed to have been made by defendant; the original was presented in court and used by his attorney in the action of A. against him as an original, genuine paper. It was objected that there was no proof that defendant signed the original. *Held*, untenable.

The judgment roll in the action of A. against defendant was offered in evidence in his behalf, but was excluded. *Held*, no error; that as plain-

141	53
142	649

141	53
151	129

141	53
153	625

tiffs were not parties to that action they were not bound by the judgment; also, as defendant had the benefit of the proof that he claimed and recovered in that action the proceeds of the check, the judgment roll was immaterial.

Defendant further claimed, on appeal, that he was bailee of the check and its proceeds, and that he should have been permitted to show on the trial that the true owner had taken it from him by legal process. No such defense was set up in the answer or alluded to on the trial. *Held*, not available on appeal.

(Argued December 22, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 6, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order which denied a motion for a new trial.

This action was brought against defendant, as sheriff of the city and county of New York, to recover the amount of a check given by one Horace J. Adams to take the place of certain property levied upon by defendant by virtue of an attachment obtained in an action brought by plaintiffs against the Illustrated News Company.

The facts, so far as material, are set forth in the opinion.

Abram Kling for appellant. The defendant as sheriff was not liable for the contracts made by Costa, a clerk in the employ of a deputy sheriff, who was not known to the defendant and in no way authorized to represent him. (*Mickels v. Hart*, 1 Den. 548; *Corning v. Southland*, 3 Hill, 552; *Dooley v. Root*, 13 Grey, 303; *Harrington v. Fuller*, 18 Maine, 277; *Wetherby v. Hoster*, 5 Vt. 136; *Kimball v. Perry*, 15 id. 414; *White v. Madison*, 26 N. Y. 117; *Ritch v. Smith*, 82 id. 627; Code Civ. Pro. §§ 644, 649, 654, 658.) It was error for the court to admit the contents of the alleged affidavit of the defendant, without proof that the defendant had signed or consented to the same. (*Southwick v. Hayden*, 7 Cow. 334; *Nichols v. K. I. Co.*, 56 N. Y. 618; *McPherson v. Rathbone*, 7 Wend. 216.) The General Term was in error when it held that the statements of an attorney made in

another proceeding are binding upon the client, notwithstanding he had no knowledge of the paper which is sought to bind as his admission. (*Cook v. Barr*, 44 N. Y. 156; *Dennie v. Williams*, 145 Mass. 25; *Duff v. Duff*, 71 Cal. 513; *Johnson v. Russell*, 124 Mass. 409; *Fay v. Hebbard*, 42 Hun, 491; *Addie v. Howe*, 15 id. 120.) It was error for the court to exclude the judgment roll in the City Court action wherein Adams was plaintiff and Flack defendant, and also error to exclude evidence that the plaintiff had notice of said proceedings and was requested to defend the same. (*Roberts v. S. S. D. Co.*, 123 N. Y. 65; *N. T. Co. v. Barber*, 56 id. 544; *Kouitzky v. Meyer*, 49 id. 571.)

Herbert T. Ketcham for respondent. The agreement by which the sheriff undertook to hold the \$1,400 as security for plaintiffs' claim was supported by ample consideration. (*Lockwood v. Bull*, 1 Cow. 322, 331, 332; Story on Bail. § 98; Bishop on Cont. § 64.) The finding of the learned judge at Circuit, that the proof of the loss was sufficient, is not the subject of review. (*Steele v. Lord*, 70 N. Y. 280, 283; *Mason v. Libbey*, 90 id. 683, 684; *Mandeville v. Rogers*, 68 id. 528.) The order in *Adams v. Flack*, denying the motion for interpleader, was properly excluded. (Code Civ. Pro. § 820.)

EARL, J. The plaintiffs obtained an attachment against the property of the Illustrated News Company, which was placed in the hands of the defendant as sheriff, and he, by virtue thereof, levied upon certain property as belonging to the news company. Mr. Adams claimed that the property belonged to him, and by an arrangement between him, Mr. Costa, a clerk of one of the sheriff's deputies and the attorney of the plaintiffs, he, Adams, gave a check to Costa to take the place of the property attached, and that property was then delivered to Adams and disposed of by him. The sheriff drew the money on the check, and Adams, claiming that the property attached belonged to him, and that the check simply took the place of it, commenced an action against the sheriff to recover the

money, and he recovered judgment, which was paid by the sheriff. These plaintiffs were not parties to that action, and, therefore, were not bound by the judgment recovered therein. After the plaintiffs had recovered judgment in the action in which the attachment was issued, and had failed to collect the amount thereof by a proper execution issued thereon, they commenced this action against the sheriff, claiming that the check was deposited by Adams as absolute security for the payment of any judgment they should recover. Upon the trial they gave evidence tending to establish their claim that the check was deposited for the purpose alleged by them, and Costa and Adams testified on behalf of the defendant that it was deposited simply to take the place of and to stand for the property attached. The trial judge charged the jury that if the arrangement as to the check was as claimed by the plaintiffs they were entitled to recover; but that if it was as claimed by the defendant he was entitled to their verdict. The charge was not complained of or excepted to, and the jury rendered a verdict in favor of the plaintiffs.

The defendant upon this appeal alleges several errors, for which he claims the judgment should be reversed:

1. It is claimed that the sheriff was not liable for the contract made by Costa, a clerk in the employment of a deputy sheriff, who was not known to the sheriff, and was in no way authorized to represent him. The answer to this is that no such point was taken upon the trial. It could have been raised by exception to the charge to the jury, or by request to charge; but it was not, and it was not mentioned as one of the grounds for a nonsuit. There was absolutely no claim upon the trial that Costa was not authorized to represent and bind the sheriff by the arrangement he made as to the property attached. While the plaintiffs' attorney was under examination as a witness, and was testifying as to the arrangement as to the attached property and the check made between him, Costa and Adams, he was asked: "Will you state what conversation took place at that time?" The counsel for the defendant then said: "To preserve our rights we object to

the declaration of Costa against the defendant." The judge overruled the objection, saying: "Under the declaration of counsel that it will be connected I will allow it to be given." And the witness then testified to the arrangement made by Costa acting for the sheriff. Evidence was subsequently given tending to show Costa's authority, and the recognition of that authority by the sheriff, and the objection to his evidence was in no way subsequently renewed. In the subsequent stages of the trial we think it was assumed that Costa was authorized to act for and bind the sheriff, and, as a witness for the defendant, he did not deny his authority.

2. The plaintiffs put in evidence what they claimed to be a copy of an affidavit made by the sheriff and used by his attorney in the action of Adams against him. It is now objected that there was no proof that the sheriff signed the original affidavit. It was presented in court and used by the sheriff's attorney as an original, genuine paper, and for reasons more fully stated in the prevailing opinions in the court below we think the evidence was sufficient to authorize the introduction of the copy in evidence.

3. It is contended on behalf of the defendant that the trial judge erred in excluding the judgment roll in the action of Adams against the sheriff. The plaintiffs were not parties to that action, and were not bound by the judgment rendered therein. The precise statements contained in the judgment roll were not important or material. The defendant had the benefit of the proof that Adams claimed the proceeds of the check in that action and recovered the same. If the plaintiffs established that the check was deposited for their security as claimed by them, then the sheriff was bound to keep it for them, and if he delivered the property attached to Adams under an arrangement so loose and uncertain that he could not defend the check or its proceeds against him, that was his misfortune, and Adams' recovery against him furnished no defense to this action. If the check was deposited under the arrangement claimed by the sheriff, then, even if the money remained in his hands, the plaintiff would not be entitled

under the arrangement to receive it. So in any event the judgment roll was immaterial. But as before stated the defendant had the full benefit of the recovery by Adams in that action.

The defendant further claims that he was bailee of the check and its proceeds, and that he should have been permitted in defense of this action to show that the true owner of the property had taken it from him by legal process. The answer to this is that no such defense was alleged in the answer, or claimed or even alluded to upon the trial.

We have now noticed all the points made by the defendant against the plaintiffs' recovery, and while we fear that injustice has been done to him by the verdict of the jury, we find no legal error upon which a reversal of the judgment could be based.

The judgment must, therefore, be affirmed,
All concur, except BARTLETT, J., not sitting.
Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
JOHN E. LEE, as Executor, etc.

JOHN E. LEE, Appellant; JOSEPH N. DWIGHT, by CHARLES
DAY, Guardian, etc., Respondent.

C., a widow, died leaving a son ten years of age her sole heir and next of kin. Her will, after some trifling bequests, contained this clause: "I will and bequeath to John E. Lee all debts, dues and demands of name, nature and kind soever I hold against him and his wife, my trunk and any keepsakes he may wish." The residue of her estate she gave to her son, to be invested by a guardian provided for, and the interest used for the education and support of her son. Mrs. Lee owed to the testatrix \$53 upon a chattel mortgage on "saloon furniture," and \$170 on what was called a chattel lien executed by her on certain horses in her possession and used by her husband as her agent. The testatrix also owned a bond and mortgage of \$1,262, executed by Mrs. Lee on the purchase by her of the land mortgaged; her husband joined in the bond. This land Mrs. Lee had sold previous to the execution of the will, conveying the same by warranty deed clear of incumbrance. The purchaser, however,

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retained the amount of the bond and mortgage and paid only the balance of the purchase money. This was known to the testatrix when she executed the will. The estate of the testatrix netted for distribution less than \$6,000. After her death, by direction of Lee, who was the executor of the will, the purchaser of said land handed to Mrs. Lee the part of the purchase money so retained, who at the same time paid it over to the executor and received a discharge of the mortgage. *Held*, that the bequest to Lee did not include said bond and mortgage. Reported below, 65 Hun, 524.

(Argued December 20, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1892, which affirmed a decree of the Surrogate's Court of Allegany county settling the accounts of John E. Lee, as executor of the will of Carrie E. Dwight, deceased. The facts, so far as material, are set forth in the opinion.

William H. Henderson for appellant. The decision of the Surrogate's Court in holding that the testatrix did not intend to bequeath the indebtedness which she then held against John E. Lee and his wife, represented by the bond and mortgage in question to John E. Lee, was erroneous. (1 Redf. on Wills, 415; Schouler on Wills, § 472; Williams on Executors, § 1080; *Champlain v. Champlain*, 58 N. Y. 620; 112 id. 308; Code Civ. Pro. § 2545; *Wadsworth v. Lyon*, 93 N. Y. 201; *Quinn v. Hardenbrook*, 54 id. 83; *Wood v. Mitcham*, 92 id. 375; *In re Denny*, 2 Hill, 223; *Vedder v. Vedder*, 1 Den. 257; *Smith v. Bell*, 6 Pet. 68; *Cottman v. Grace*, 112 N. Y. 299.)

Clarence A. Farnum for respondent. The testatrix did not give to John E. Lee the sum secured to be paid by the bond and mortgage from the Lees to Farnum and by Farnum assigned to her. (Schouler on Wills, § 479; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Scholle v. Scholle*, 5 Barb. 312; *Mann v. Mann*, 14 Johns. 1; *Stimson v. Vroman*, 99 N. Y. 74; *Delaney v. Van Aulen*, 84 id. 16; *Lynes v. Townsend*, 33 id. 558; *Wood v. Mitcham*, 92 id. 375; *Knowlton v. Atkins*,

134 id. 313; *Roosevelt v. Fulton*, 7 Cow. 71; *Anderson v. Schoppe*, 84 Maine, 170; *Bills v. Putnam*, 64 N. H. 544.)

FINCH, J. It is not at all uncommon, both in the construction of statutes and of wills, to find language broad and general enough to include things not really contemplated or intended, and creating an emergency in which the courts are permitted to say that the doubtful matter, though within the words, is not within the spirit and meaning of the phrase to be construed. The courts below have applied that solution to a dispute in the case at bar over the scope and meaning of a bequest to the appellant which reads thus: "I will and bequeath to John E. Lee all debts, dues and demands of name, nature or kind soever I hold against him and his wife, my trunk and any keepsakes he may wish," and have construed the language as not intended to cover a bond and mortgage made by Lee and his wife and assigned to the testatrix before her will was made. We are at liberty to consider the circumstances surrounding her when she made that will, and read it in the light which they throw upon it; not to determine what she ought to have done, but to ascertain what, within her purpose and intention, she really did. (*Stimson v. Froman*, 99 N. Y. 74.) The testatrix was a widow, having one son, an infant about ten years of age, who was her sole heir at law and next of kin, and was in possession of an estate amounting, as inventoried, to a trifle over \$7,000. Included in it were a debt due from Emma A. Lee upon a lease dated in 1885 for the sum of \$170, and a claim against her for \$53 upon a chattel mortgage. There was also included a bond and mortgage on which was due at the date of the inventory \$1,246, and the history of which is set forth in the record.

Edward J. Farnum conveyed to Emma A. Lee, in April of 1885, a parcel of land in Pennsylvania, taking a bond and mortgage for the purchase money. The bond was signed by the mortgagor and John E. Lee, her husband. In September of 1887, Farnum assigned the bond and mortgage to Mrs. Dwight, the testatrix. In April, 1888, Mrs. Lee and her hus-

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Opinion of the Court, per FINCH, J.

band conveyed the mortgaged land to one S. E. Crittenden for the sum of \$2,300, by a warranty deed, free and clear from all incumbrance. While the purchaser did not in form assume the outstanding mortgage, he in fact deducted and kept back the amount due upon it, and paid down only the excess. So much of his purchase money as would balance the sum unpaid on the mortgage, he never paid to his grantors at all except formally and for an obvious purpose. When Crittenden came to pay, he had his own protection in view, and did not mean to depend on a mere personal covenant of very doubtful utility, and was careful to have his final payment at the same moment extinguish the mortgage, for he says that he talked with the executor about paying it, and that it was by the latter's direction that he handed the money to Mrs. Lee, the executor at the same time giving a receipt in discharge of the mortgage. Passing the money formally through the hands of the wife altered in no respect the actual fact, but was supposed to be a needed ceremony. So that while the papers in form gave Crittenden only the protection of the covenants in his deed, the transaction in fact was an assumption of the mortgage as part of the purchase price. To that extent his land was bound, and he stood practically debtor to Mrs. Dwight. That the situation was known to her must be inferred from the lapse of time during which it continued, from the relation of agency subsisting between her and Lee, and from the fact that Crittenden paid her through Lee the interest on the mortgage, the latter receipting for it in her name. That receipt was dated April 12th, 1889, which was about three months before the will was made. It does not appear what, if anything, Lee, as an individual, owed Mrs. Dwight at the latter date, but that is not very material in view of the facts which are inferentially disclosed. The chattel mortgage for \$53 was on certain "saloon furniture," and its existence indicates an impecunious condition of its proprietor. It is not shown who kept the saloon, and it may have been Mrs. Lee, either in form or in fact, though her husband wore the general character of agent, and if he did business at all, seems to have

done it under cover of her name, a fact which indicates the possibility of unsatisfied creditors. He said at first that he did not sign the chattel mortgage, but later modified his confidence into a statement that he did not "think" he did, but was "not positive," and adds that at the time of Mrs. Dwight's death, the saloon furniture was in "*our* possession." Some truth is inferable from the use of that pronoun "*our*." What the "chattel lease" was, on which Mrs. Lee owed the \$170, it is not easy to understand. Lee says: "Lease was on some horses;" "were given to her husband four or five years ago;" and again, "My wife had the horses in her possession. She owned them, so far as I know, except for lease." The nature of the transaction is not quite clear, but it evidently enabled the husband to use the horses as agent, while his wife occupied the legal position of owner. On these facts, we cannot fail to see that Mrs. Dwight, looking only at what appeared, and unversed in the legal arrangements by which husbands become agents for wives who are owners, naturally regarded both debts as those of the husband and wife jointly, and may have been right in so doing, and did not puzzle over their separate relation to each, and so in her will, meaning to forgive the debts effectually, spoke of them as due from Lee and his wife.

But did she mean more than that? Did she intend also to give them the bond and mortgage which she knew Crittenden was to pay without in fact requiring of them the actual disbursement of a single dollar? Technically the bond was a debt of theirs, but substantially the land in the hands of Crittenden was the debtor, and was amply sufficient to yield the amount due. The two small debts might easily be forgiven, since their collection at all was scarcely to be expected, and the bequest seemed trifling in view of that probability; but the mortgage was perfectly secure, and could be collected in full without causing to Lee and his wife the sacrifice of any sum. The gift of that would simply take from the infant son about one-fifth of the very little which the mother had to give him, and for the benefit of strangers. How strongly she felt for

the child is evident from the tone of the will. She speaks of him as her dear and beloved son; she gives him the whole residue and remainder after what she supposed to be a few slight gifts to others; she provides for a guardian who shall invest his portion, and use the interest for his education and support; and yet we are asked to believe, as argued out from general words, that this same mother, from an estate which nets for distribution only \$5,994, deliberately intended to take away from her child, poorly provided for at the best, the sum of \$1,262, to be given, not to mother or sisters, but to strangers. One shrinks from such an unnatural conclusion, and looks about him to see how words capable of such a construction came to be used. I think we can see how. In the mind of this widow, untrained in the rules of law, the mortgage was a specific article of personal property held in her manual possession as much as if it had been an organ or trunk, articles which she bequeathed by name. Very commonly among the people, and even sometimes among lawyers and judges, the incident has usurped the place of the principal, and the conception of a debt has been overlooked in the presence and tangible character of the security. It is the mortgage and not the bond that is deemed the property and thing of value, and so if this testatrix had intended a gift of the mortgage she would naturally have given it as such and specifically, and not left it to be inferred from general words giving debts and demands. And still less would that form of expression convey to her mind the idea of a gift of the mortgage when she regarded that as the debt of Crittenden, and of the land in his hands, and had ceased to think of it as involving a debt of Lee and his wife at all.

Sometimes the maxim *noscitur a sociis* helps us to an understanding of the real meaning intended, and with its aid it becomes quite apparent that in the clauses preceding the gift of the entire residue and remainder to her infant son, the testatrix meant to give only slight and trivial things which would be of little use to her child and which could be spared without injury to him and without any serious diminution of the

whole estate to be given to him. She provides for a burial lot and headstone. She gives to Effie Dwight, "my organ, family bible, one set of silver teaspoons, one bed and bedding;" to Mrs. Goff, "two oil paintings and willow rocking chair;" to her sister, Mrs. Hulbert, "all my wearing apparel;" and then follows the gift to Lee of debts supposed to be extremely doubtful at the best, "my trunk, and any keepsake he may wish." A construction which interjects into this sequence of kindly gifts, which would scarcely deplete the full estate intended for the son, a bond and mortgage for over \$1,200 is unexpected and a surprise. The sudden elevation from a chair and clothing to such a mortgage, and the instant drop from that height to a trunk and some trifling keepsake is extremely odd and strikes one as unnatural. I do not think it was meant or intended at all, and am quite prepared to assent to the conclusion of the surrogate and the General Term that the bequest to Lee did not cover or carry the bond and mortgage.

The judgment should be affirmed, with costs against the appellant personally.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

JEROME D. HOLMES, Appellant, v. WILLIAM E. ROPER et al.,
as Administrators, etc., Respondents.

An executory promise to pay a sum of money, made without consideration, and intended to operate as a gift after the death of the promisor, is invalid and cannot be enforced.

Where a question put to a witness calls only for proper testimony, but in the course of the answer the witness gives testimony that is improper, the remedy of the party is by motion to strike out the improper testimony, and if he omits, upon the trial, to insist upon his right to have such testimony excluded, its reception is not a ground for reversal; on appeal, an exception to the question is not sufficient.

(Argued December 20, 1893; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which affirmed a judgment in favor of defendants entered upon an order of Special Term confirming the report of a referee, dismissing a claim presented by plaintiff to defendants, as the administrators of Job Holmes, deceased.

The facts, so far as material, are set forth in the opinion.

S. D. Halliday for appellant. The note was given by the intestate directly to Jerome D. Holmes, the plaintiff. The note itself imported consideration, and made a *prima facie* case. (*Carnwright v. Gray*, 127 N. Y. 92; *Price v. Craft*, 12 Johns. 91; *Hughes v. Wheeler*, 8 Cow. 83; *Butler v. Rawson*, 1 Den. 106.) For the purpose of establishing want of consideration the defendants, under the objections and exceptions of the plaintiff, proved declarations and admissions of Rufus Holmes upon that question, which declarations were made about January 25, 1885, months after the original note had been given, and months after Rufus Holmes had ceased to have any interest whatever in it. This was error. (Code Civ. Pro. § 829; *Christie v. Bishop*, 1 Barb. Ch. 115; *Hurd v. West*, 7 Cow. 752; *Beach v. Wise*, 1 Hill, 612; *Brisbane v. Pratt*, 4 Den. 64; *Van Gelder v. Van Gelder*, 81 N. Y. 625; *Hutchins v. Hutchins*, 98 id. 64; *Paige v. Cagwin*, 7 Hill, 368; Greenl. on Ev. § 190.) There was an effort to prove the declarations of Rufus Holmes in the spring of 1883, before the note was given. These declarations were equally incompetent. (*Hutchins v. Hutchins*, 98 N. Y. 64.)

Simeon Smith for respondents. Declarations by Rufus Holmes at a time prior to the date of the note were competent to impeach the consideration of the note. (*Millenery v. Lucas*, 3 Hun, 496; Code Civ. Pro. § 723; 12 Wend. 47; 55 Barb. 589; *Paige v. Cagwin*, 7 Hill, 379; *Von Sachs v. Kretz*, 72 N. Y. 553.)

O'BRIEN, J. The defendants are the personal representatives of Job Holmes, who died intestate on the 7th of July, 1887. The plaintiff is a nephew of the deceased, and son of Rufus Holmes, a brother of the intestate. Within the period for presentation of claims against the estates of deceased persons, the plaintiff presented to the defendants a claim based upon an instrument, of which the following is a copy :

"\$2,000.

CANDOR, *September 14, 1885.*

"For value received, I promise to pay Jerome Holmes two thousand dollars, thirty days after my death.

"JOB HOLMES."

The claim was disputed by the defendants, and having been referred under the statute, the referee reported in favor of the plaintiff. The confirmation of the report was resisted upon a case and exceptions which contained an application for a new trial upon newly discovered evidence, but the report was confirmed. The General Term, however, upon appeal, set aside the report and granted a new trial. On a second trial the referee reported against the claim and his decision has been sustained in the courts below. As there were no pleadings the nature of the defense must be ascertained from the evidence and that indicates that the claim was resisted upon three grounds: 1. That the instrument was a forgery. 2. That if genuine it was procured by duress and fraud. 3. That the note was in the nature of a gift and wholly without consideration. The referee found upon the evidence that the instrument was signed and delivered without consideration and for the purpose, on the part of the deceased, of providing for a gift to the plaintiff of two thousand dollars out of his estate. It is well settled that an executory promise of this character, without consideration, and intended to operate as a gift after death, cannot be enforced. (*Harris v. Clark*, 3 N. Y. 93.) And there is no claim made upon this appeal that the legal conclusions of the referee were erroneous. Nor is it urged that this court can review the findings of fact upon which the conclusion was based, but, on the contrary, it is

frankly admitted that the evidence was of such a character as to render the finding conclusive upon the plaintiff here. The learned counsel for the plaintiff has directed the whole force of his argument against certain rulings of the referee in the course of the trial, to which exceptions were taken. The principal question arises upon the admission of certain declarations of Rufus Holmes, made after the note, of which the one in suit was a renewal, was given. The plaintiff attempted to establish the validity of his claim upon the theory that the deceased was indebted to Rufus in the sum of \$2,000 in the fall of 1884, and that this debt was paid by giving the note to the plaintiff with the consent of Rufus, his father, and that on September 14, 1885, that note was taken up and the one in question given in its place. These facts, if proven, would establish a valid consideration for the note, as the transaction would amount to a gift of the debt by Rufus to his son, the plaintiff, and the delivery of the note in payment of the same by the deceased. The existence of the alleged debt, or any debt whatever, from the deceased to his brother Rufus became, therefore, a material and important issue at the trial. The learned counsel for the plaintiff is doubtless correct in his contention that the legal relation and situation of the parties is the same as if the deceased had given the note directly to his brother Rufus and the latter had immediately transferred it to his son, the plaintiff, and that under such circumstances the admissions or declarations of Rufus after the transfer of the note and all of his interest in the debt, are not admissible against the plaintiff in a proceeding for the collection of the claim. The general rule is that a former owner of a chattel or a chose in action who has transferred his interest to another by an absolute sale or assignment, cannot, by his subsequent admissions, affect the right of the purchaser. In some cases such admissions may be admissible, but only where there is an identity of interests between the assignor and assignee which is deemed to exist where the transfer is merely colorable or nominal, and where a party claims through another by representation, and the declaration is not excluded by some other

rule of evidence. (*Van Gelder v. Van Gelder*, 81 N. Y. 625; *Hutchins v. Hutchins*, 98 id. 64; *Gardner v. Barden*, 34 id. 435; *Christie v. Bishop*, 1 Barb. Ch. 115; *Fitch v. Chapman*, 10 Conn. 8; *Smith v. Webb*, 1 Barb. 234; *Brisbane v. Pratt*, 4 Denio, 64; *Paige v. Cagwin*, 7 Hill, 368; 1 Greenleaf on Ev. § 190.)

We think, however, that the question is not fairly presented by the record. It appears that Dr. Roper, the son-in-law and one of the administrators of the deceased, was examined and cross-examined at length as a witness, his testimony covering some twenty-five pages of the record. During his narrative there was interjected here and there into it various documents, writings and books of account, some of them representing transactions between the two brothers. The words of the witness and the extraneous matter taken from books and papers are so intermingled that it is sometimes difficult to distinguish between them. All of this was supposed to bear in some way either upon the genuineness of the signature to the note or upon the fact of indebtedness, one way or the other, between the two brothers and a settlement of the same. The witness, in the course of his examination, stated, without objection, that he heard a conversation between the two brothers in the month of December, 1884, or the early part of the month of January, 1885, with reference to the sale of property which they owned jointly. It seems that the witness and Rufus were then present at the house of the deceased, and it must be remembered that the parties were engaged in a trial without pleadings of three distinct issues: First, whether the signature to the instrument was genuine; secondly, whether, if genuine, it was not procured by fraud, and, finally, whether there was any consideration to sustain it under any circumstances. Any fact or circumstance that had any bearing upon either or any of these issues was competent. The plaintiff's counsel objected to the conversation as hearsay, improper, irrelevant and immaterial. The defendants' counsel stated that it was offered on the question of consideration. The referee overruled the objection and the defendants excepted. The witness then pro-

ceeded to state that he heard them talk about selling land owned by them in common, and which it appeared from deeds produced had been subsequently conveyed. The witness then stated that he asked Rufus what his object was in selling the land, and Rufus replied, giving as one of the reasons that he was owing Job, his brother, \$3,000, and the only way to pay it was by sale of the land. This latter statement is what the alleged error is predicated upon. Now, it will be seen that it is not clear whether this conversation was had before or after the original note was given. It was certainly before the execution of the note in suit, and the question was, whether that was founded upon any consideration, as the existence of the former note was denied by the defendants, and from their standpoint they had the right to show what transpired between the brothers prior to the date of the note in question. But the question or the offer did not call for the admissions or declarations of Rufus simply, but for a conversation or transaction between the two brothers which might show a settlement or bear in some way upon the genuineness, consideration or validity of the instrument, as a promise to pay a certain sum of money after death. It might as part of the *res gesta* tend to prove a settlement between the brothers, and, instead of an indebtedness by the deceased to Rufus, just the reverse. If the witness in relating the conversation or transaction interjected into it statements or admissions of Rufus to him alone, and not in the presence of his brother, they are not covered by the exception. The plaintiff's counsel should have brought out the facts so as to present the precise point to the mind of the referee. When the question put to a witness in itself calls for nothing but testimony which is proper, but in the course of the answer improper matter is added or intermingled with it, the remedy of the opposite party is by motion to strike out whatever appears to be improper or irresponsive to the inquiry. (*Bronner v. Frauenthal*, 37 N. Y. 166; *Bardin v. Stevenson*, 75 id. 164; *Denise v. Denise*, 110 id. 562.) When in such a case the party against whom the testimony was given, omits at the

trial to insist upon his right to have what is incompetent separated from what is competent, and the former excluded, he cannot, upon appeal, select such parts of the testimony as may appear to be improper, but was not necessarily called for by the question, and ask the court to reverse on such grounds. It is at least doubtful upon the record whether the objectionable statements by Rufus were made to the witness alone or were part of the transaction with his brother, or at least made in his presence, but in any event the objection did not present the point to the referee. This disposes of the main exception discussed by plaintiff's counsel. There is another exception to the admission of certain statements of Rufus in 1883, before any note was claimed to have been given, but they were all drawn out by questions calling for actual business transactions and the conversations therein of the two brothers, and tended to show the nature of the business and the state of the accounts and, while the witness sometimes departed from the strict line of inquiry called for and made statements that were not strictly responsive, yet these were not for the reasons already stated covered by the objection and are not available. The other questions in the case require no further discussion. They were properly disposed of in the court below.

The judgment should, therefore, be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

FRANK M. GILLETT et al., Respondents, v. WILLIAM I.
WHITING, Appellant.

Where a broker who had purchased stock for a customer on a margin, sold it without previous notice to the customer, and thereafter presented an account to the latter showing the sale and a resultant loss, and the latter, without objection as to the manner of sale, promised to pay the balance shown by the account to be due, *held*, that he thereby waived the right to notice, and recognized and ratified the sale made.

In an action by a stock broker to recover a balance alleged to be due from a customer, where an unauthorized sale was claimed, plaintiff proved the service of an account showing the sale as made and a promise of defendant to pay the balance shown to be due, although declaring that he knew plaintiff had violated his contract by making the sale. The court was requested, but refused, to charge that, "to make defendant liable for a ratification of an unlawful sale, it must appear to the satisfaction of the jury that he knew his legal rights." *Held*, no error.

Defendant, on cross-examination of plaintiff, for the purpose of discrediting the alleged purchases, sought to follow through plaintiff's books, not only the transactions in question, but his dealings with other customers. The court allowed this, except as to the names of the other customers. *Held*, that the limitation was within the discretion of the court; that the discretion was reasonably exercised; and so, there was no error.

It was shown what books were kept by plaintiff. Defendant offered to prove by experts what books were usually kept by stock brokers; this was excluded. *Held*, no error.

(Argued December 22, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of December, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict and also affirmed an order denying a motion for a new trial.

This action was brought by plaintiffs, who were stock brokers, to recover a loss incurred by them on a sale of 100 shares of Chicago and Northwest common, and 100 shares of Ohio Southern stock, which they claimed to have purchased and carried for defendant on a margin.

The complaint alleged, and it appeared, that on September 30, 1884, defendant deposited with plaintiffs as a margin \$200, and requested them to purchase for him 100 shares of Ohio Southern railroad stock; that on October 3, 1884, they purchased said stock at the market price, which, with their commissions, amounted to \$1,100; that on October 7, 1884, defendant deposited \$200 more with plaintiffs and requested them to purchase for him 100 shares of the Chicago and Northwest railroad stock; that on October 8, 1884, plaintiffs purchased the same at the market price, which, with their commissions, amounted to \$9,350; that defendant gave no orders to plaintiffs as to how long he wished them to carry said stocks; that the Chicago and Northwest stock having fallen in price so that the \$200 and \$500 besides were lost, plaintiffs, on October nineteenth, sold it for \$8,575. On or about December first plaintiffs rendered to defendant an account with interest adjusted as of November thirtieth, showing the sale and a balance then due of \$1,505.08, with 100 shares of Ohio Southern stock on hand, worth about \$950, and requested defendant to make good the deficiency by remitting to them \$500 or \$600 in cash; that defendant having failed to do so, on January 17, 1885, they sent him notice in writing that if he did not pay them \$500 on account of said deficiency before January twenty-eighth they would close out the account by the sale of said stock.

Defendant having failed to comply with their demand, plaintiffs sold the Ohio Southern stock, and a judgment was demanded for the balance due plaintiffs on the account.

The further material facts are stated in the opinion.

Joseph A. Shoudy for appellant. The plaintiffs having acted in disregard of the obligations of their contract with the defendant, could not recover under the allegations of their complaint. (*Gillett v. Whiting*, 120 N. Y. 404.) There was no proof of ratification and no sufficient evidence to go to the jury upon that question. (*Gillett v. Whiting*, 120 N. Y. 406; *Stillwell v. M. L. Ins. Co.*, 72 id. 302; *Whitney v. Martew*,

88 id. 540.) The court erred in restricting the defendant's right of cross-examination of the witness Gillett.

Ira D. Warren for respondent. The court instructed the jury that such sale was unauthorized and constituted a conversion of this stock, and then instructed the jury that if after the stock was sold and after defendant had a knowledge of the whole transaction he promised to pay this account, that plaintiffs were entitled to recover. This was correct. (*Gillett v. Whiting*, 120 N. Y. 406.) It was not necessary for defendant to know the legal effect of his promise to pay this loss. (*C. Bank v. Warren*, 15 N. Y. 577; *Hyatt v. Clark*, 118 id. 567; *Hazard v. Spears*, 2 Abb. Ct. App. Dec. 353; Story on Agency, §§ 239-243; *De Freest v. Warner*, 98 N. Y. 217; *Way v. Sperry*, 6 Cush. 238.)

FINCH, J. On a former appeal in this case it was held that the broker's sales of the stock bought for the defendant were unauthorized for lack of notice of the time and place of sale, which amounted to a conversion, and that such unwarranted sales destroyed the foundation of plaintiff's claim, and left him without remedy for the advances made. (120 N. Y. 402.) It is now insisted that the Second Division of this court in so ruling disregarded earlier decisions to the contrary, disturbed a settled doctrine, and left it impossible to reconcile the cases. (*Gruman v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 id. 419; *Minor v. Beveridge*, 67 Hun, 1.) We shall certainly try to clear the doctrine of its difficulties, and end the supposed collision of authorities when the fit occasion comes; but to make the effort now would compel us to go entirely outside of the very different question involved in this appeal. For the Second Division further held, referring to some evidence appearing in the record, that if it should be proved that after the unauthorized sales had been made, and after due notice of them had been given to the defendant, and after an account had been presented embodying the result, the customer promised to pay the resultant loss as a balance due, it would be con-

clusive upon him, and justify a judgment for the plaintiff; and the case has been tried and decided on that theory. The court charged the jury that there could be no recovery unless they became satisfied that such promise had been made with full knowledge of the facts, and submitted that question, arising upon evidence quite contradictory, as the substantial issue to be determined. What remains for us to consider is simply whether there was any evidence to sustain the verdict, which was for the plaintiff, and whether any material errors occurred in reaching that result.

The promise of the defendant, if made, can operate as a waiver of the right to notice, or as a ratification of the method of sale adopted, and so does not require that the proof should reach to the extent of an account stated, a denial of which, as a proven fact, furnishes the basis for the appellant's principal argument. Without an actual agreement upon a precise balance, and a promise to pay that as such, the evidence may still show a promise on the part of the defendant which necessarily recognizes and ratifies the sales made, and the method which the broker pursued.

The principal loss occurred from the sale of the Northwestern stock. The capital advanced for its purchase by the broker was over eight thousand dollars, and the loss on the sale about ten per cent, with only a margin of two hundred dollars to apply on the deficiency: while the Ohio Southern cost only about eleven hundred dollars, which its own margin of two hundred dollars fully and sufficiently protected. The Northwestern stock was sold on or about October 18th, 1884, and it is agreed on all sides that on the 2d day of the ensuing December the brokers made up an account to that date which showed the sale made, the prices given and received, the amount of the loss, and claimed a balance due from defendant of over \$1,500, to be further reduced by the outcome of the Ohio Southern stock still remaining on hand. With the account went a letter calling for five or six hundred dollars to apply upon the deficiency, and as an approximate sum to cover the loss which could not be precisely ascertained until a

sale of the Ohio Southern. This account and letter the defendant received, and with a full knowledge of the sale made and the price realized, the evidence tends to show that he promised to pay the sum demanded. Making no objection to the sale, raising no question of want of notice to him, in no manner criticizing the broker's action, the defendant accepted the result, and ratified the action which produced it, by promising to pay the deficiency. As it respects the Northwestern stock there is abundant evidence to sustain the conclusion of the jury that the defendant waived the objection of want of notice, and ratified the sale made.

The case is equally strong as to the later sale of the Ohio Southern. That was sold in January of 1885. The defendant admits in effect that he received a notice prior thereto that unless he made good the deficiency already existing by the 28th of January, the stock would be closed out. He thus had substantial notice of the time of sale and opportunity to protect himself if he pleased, and in view of his previous waiver and assent to the mode of sale adopted, a more precise or particular notice was hardly requisite. And in addition, there is again proof that after all the sales were made and when he knew they were made he promised to pay the resultant loss. He denies that, but his cross-examination weakened his credibility and the conflict of testimony was settled by the verdict of the jury.

There were some exceptions taken on the trial, but rather technical than substantial. On the cross-examination of plaintiff, the counsel for the defendant sought to follow through the books of account produced, not only the transaction in question, but other dealings with other people, for the avowed purpose of discrediting the alleged purchase of the brokers. That had been positively sworn to and the checks used had been produced and identified. Nevertheless, the court allowed free range of inquiry except as to the names of the other customers, and that restriction is the subject of an exception. I think it was fairly within the discretion of the court and that such discretion was reasonably exercised.

The offer to prove by an expert what books are usually kept by stockbrokers was clearly inadmissible. What books the plaintiffs did keep was shown, and what had become of them. If there was basis for claiming that any were withheld, the counsel had his remedy and could submit his inferences to the jury.

Passing by some trivial objections based on the form of answers made, we come to the exception to the court's refusal to charge that, "to make the defendant liable for a ratification of an unlawful sale, it must appear to the satisfaction of the jury that he knew his legal rights." What rights were referred to, or how the plaintiff was to prove the extent of defendant's legal knowledge, we are not told, nor why the latter, instead of asserting ignorance, explicitly declared that he knew plaintiff had violated his contract by selling his, defendant's, property. No ground existed for such a charge, even if in any conceivable case it could be justified. It cannot be necessary to argue seriously that there was no error in the court's refusal.

The judgment should be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

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JANE E. McLAUGHLIN, Appellant, v. EDWARD WEBSTER et al.,
as Executors, etc., Respondents.

In an action to recover an alleged unliquidated indebtedness, the defendant, under a plea of payment, is entitled to give proof of any valid agreement between the parties which would operate to discharge the debt.

In an action against executors to recover the value of services alleged to have been rendered the deceased, *held*, that defendants, under a plea of payment, were entitled to prove an agreement between plaintiff and the testator that certain devises and bequests to the former in the will of the latter should be in full payment and discharge of any claim for such services, save in case the will failed to be admitted to probate; and that as the claim was unliquidated and of a character that could be legally discharged by such an agreement, and it having been performed by decedent, and the provision made for him in the will accepted by plaintiff, a complete defense to the action was established.

N. Y. Rep.]

Statement of case.

The referee on trial, on application of defendants' counsel, permitted the answer to be amended by alleging the agreement. *Held*, no error; that while the amendment was unnecessary the referee had power to allow it. (Code Civ. Pro. §§ 721, 722, 723.)

On the trial, one of the executors, defendants, who was also a residuary legatee under the will, as a witness for the defense, testified to a conversation with decedent, in the presence of plaintiff. This was objected to as incompetent under the Code of Civil Procedure (§ 829). *Held*, untenable, as the Code simply excluded such testimony when sought to be given against, not when given, as here, in favor of the personal representatives of the deceased.

(Argued December 18, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which affirmed a judgment in favor of defendants entered upon the report of a referee.

This action was brought to recover upon a claim for work, labor and services alleged to have been rendered by plaintiff for Robert Sherman, defendants' testator, during a period of thirty-eight years.

The facts, so far as material, are stated in the opinion.

William A. Sutherland for appellant. Satisfaction of the debt by the legacies given plaintiff in decedent's will is not pleaded as a defense. (*Patterson v. Patterson*, 13 Johns. 379; *Quackenbush v. Ehle*, 5 Barb. 469; *Todd v. Webber*, 95 N. Y. 181, 193.) An agreement to pay by will, and its execution by the testator in satisfaction of the claim, must be pleaded in order to be available. It is new matter. (Code Civ. Pro. § 500, subd. 2; *McKyring v. Bull*, 16 N. Y. 297, 304; *Fort v. Gooding*, 9 Barb. 371; *Wehle v. Butler*, 12 Abb. [N. S.] 139; 61 N. Y. 245; *Chapin v. Pratt*, 49 N. Y. S. R. 42; *Wallace v. Blake*, 40 id. 609; *Vail v. L. I. R. R. Co.*, 106 N. Y. 283; *Seymour v. McKinstry*, Id. 230.) The legacies given under the will are not expressed to be in satisfaction of any indebtedness, nor to apply upon any indebtedness. The legacies, therefore, do not reduce the indebtedness.

(*Adams v. Olin*, 61 Hun, 318; *Boughton v. Flint*, 74 N. Y. 476; *Porter v. Dunn*, 131 id. 314; *Reynolds v. Robinson*, 82 id. 103; *Parker v. Coben*, 10 Allen, 82.) If the will itself does not expressly make the legacies a payment of any indebtedness, the clearest and most unmistakable proof is required of an agreement between the testator and the creditor that the debt should be so extinguished by the legacies. (*Porter v. Dunn*, 131 N. Y. 314; *Williams v. Crary*, 4 Wend. 443; *Reynolds v. Robinson*, 82 N. Y. 103; *Fort v. Gooding*, 9 Barb. 371; *Boughton v. Flint*, 74 N. Y. 482.) If the court is of the opinion that the amendment of the answer, made after the case was summed up, changed the nature of the pleading so as to set up a contract to pay this debt by will, which was fulfilled, then the referee committed a fatal error in allowing the amendment against the objection of the plaintiff. It introduced a new and inconsistent defense. (Code Civ. Pro. §§ 721, 722, 723; *N. S. Co. v. Sheehan*, 122 N. Y. 462; *Freeman v. Grant*, 132 id. 22; *Dexter v. Ivins*, 133 id. 551; *Hong Kong v. Emanuel*, 44 N. Y. S. R. 454; *Livermore v. Bainbridge*, 14 Abb. [N. S.] 227; *Reed v. McConnell*, 133 N. Y. 425; *Shaw v. Bryant*, 47 N. Y. S. R. 227; *McPherson v. Ronner*, 18 J. & S. 448; *Quinby v. Claflin*, 77 N. Y. 270; *Baldwin v. Rood*, 17 N. Y. S. R. 517.) It is no defense to this exception to the allowance of the amendment to say that evidence was allowed to come before the referee without objection which tended to show an expectation on the part of the plaintiff to be provided for by the will of her employer, because the evidence was offered to disprove the contract of employment and to substantiate the defense as pleaded that the services were not those of a servant, but were gratuitously rendered. The evidence was competent upon that issue and does not authorize this amendment setting up an entirely different and inconsistent defense. (*Dexter v. Ivins*, 133 N. Y. 551; *Shaw v. Bryant*, 47 N. Y. S. R. 227; *McPherson v. Ronner*, 8 J. & S. 448; *Quinby v. Claflin*, 77 N. Y. 270.) The referee has expressly found that on the 1st of May, 1852, when this claim commenced, the plaintiff was in the employ

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of Robert Sherman, rendering for him and at his request household services; and that an agreement was at that time existing between Mr. Sherman and this plaintiff that he would pay her for the services which she was then rendering their fair and reasonable value. The legal presumption is that that relation and that contract continued during the entire period covered by this claim. (1 Greenl. on Ev. 41, 42; 1 Starkie on Ev. 36; 1 Phillips on Ev. 603; *Wallrod v. Ball*, 9 Barb. 271; *Cooper v. Dedrick*, 22 id. 516; *Meyer v. Hallock*, 2 Robt. 284; *Gilbert v. Comstock*, 93 N. Y. 484.) The fact of the rendition of the services at the request of the testator raises the presumption of a promise to pay what those services were worth. (*In re Merchant*, 25 N. Y. S. R. 268; 34 id. 1110; *Doremus v. Lott*, 49 Hun, 284; *Thornton v. Grange*, 66 Barb. 507; *Rhodes v. Stone*, 44 N. Y. S. R. 17; *Odell v. McKue*, 13 Wkly. Dig. 457.) A new trial should be ordered because of the receipt of incompetent evidence upon the trial bearing upon the questions in dispute. (*Taylor v. Milgrum*, 6 Civ. Pro. Rep. 235; *Gersman v. Wolf*, 46 Hun, 289; *Holcomb v. Holcomb*, 95 N. Y. 316; *Herrington v. Winn*, 60 Hun, 235; *Brigham v. Gott*, 3 N. Y. Supp. 518; *Scott v. Scott*, 13 N. Y. S. R. 202; *Smith v. Meagan*, 40 Hun, 401; *Rittenhouse v. Creveling*, 38 N. Y. S. R. 280; *In re Dunham*, 121 N. Y. 575; *In re Bartholick*, 35 N. Y. S. R. 730; *In re Eysman*, 113 N. Y. 62; *Pinney v. Orth*, 88 id. 447.)

J. A. Stull for respondent. To constitute error the findings of the referee must be not only inconsistent but irreconcilable with each other. (*Bonnell v. Griswold*, 89 N. Y. 122; *Schwinger v. Raymond*, 83 id. 192; *Redfield v. Redfield*, 110 id. 671.) The point taken by the appellant at General Term, that the decision of the referee does not conform to the allegations of the answer as amended on the trial, suggests no error for which the judgment should be reversed or a new trial granted. (Code Civ. Pro. §§ 519, 539, 540, 723; *Foot v. Roberts*, 7 Robt. 17; *Howdoin v.*

Coleman, 3 Abb. Pr. 431; *Harrower v. Heath*, 19 Barb. 331; *Cady v. Allen*, 22 id. 388; *Hudson v. Swan*, 7 Abb. [N. C.] 324; *K. L. Ins. Co. v. Nelson*, Id. 181; *Harris v. Tunbridge*, 83 N. Y. 92; *Bartholomew v. Lyon*, 67 Barb. 86; *Buckingham v. Dickinson*, 54 N. Y. 682; *Hoffman v. N. Y., L. E. & W. R. R. Co.*, 18 J. & S. 403; *Van Ness v. Bush*, 14 Abb. Pr. 33; *Copeland v. J. M. Co.*, 19 N. Y. S. R. 212; *Walsh v. B. S. Bank*, 26 id. 95.) Upon the actual state of facts, and in the absence of any contract to pay her wages as a mere employee, the plaintiff could not recover in this action. (*Jacobson v. La Grange*, 3 Johns. 200; *Shakespeare v. Markham*, 10 Hun, 311; *Patterson v. Patterson*, 13 Johns. 379; *Dye v. Kerr*, 15 Barb. 444; *Williams v. Hutchinson*, 3 N. Y. 312; 5 Barb. 123; *Robinson v. Cushman*, 2 Den. 149; *Wilcox v. Wilcox*, 48 Barb. 327; *Andrews v. Foster*, 17 Vt. 556; *Fitch v. Peckham*, 16 id. 150.) None of the exceptions taken by plaintiff on the trial to the admission or rejection of evidence, were valid or well taken. (*Holcomb v. Campbell*, 118 N. Y. 46; *Titus v. O'Connor*, 18 Hun, 373; *Pierney v. Orth*, 88 N. Y. 447; *McKenna v. Bolger*, 37 Hun, 526; *Tomlinson v. Seifert*, 2 N. Y. S. R. 283.) The amendment of the answer on the trial by the insertion of a single phrase was properly granted, and the exception thereto was not well taken. (Code Civ. Pro. §§ 519, 539, 540, 723, 1018; *Hunter v. H., R. I. & M. Co.*, 20 Barb. 493; *Myer v. Fliegel*, 34 How. Pr. 434; *Enright v. Seymour*, 8 N. Y. S. R. 356; *Van Ness v. Bush*, 14 Abb. Pr. 33; *Fegg v. Edwards*, 20 Hun, 90; *Smith v. Rathburn*, 13 id. 47; 75 N. Y. 122; *Chapin v. Dobson*, 78 id. 74; *Peysor v. Wendt*, 87 N. Y. 322; *O. S. Co. v. Otis*, 15 Wkly. Dig. 165; *Price v. Brown*, 112 N. Y. 677.)

O'BRIEN, J. The defendants are the executors of the will of Robert Sherman, who died on the 26th of December, 1890. About the year 1844 the plaintiff, then a girl less than eleven years of age, went to live in the family of the deceased, her father having died some years before, and her mother in that

year. During the first four years she attended school a part of the time. In the year 1856 the decedent's wife died, and subsequently his two only children, who were born after the plaintiff became a member of his household. After the death of the children the family consisted of the decedent and the plaintiff and such other hired help as became necessary in the conduct and management of a small farm. The plaintiff, during all the time up to the death of the testator, was treated by him and by her friends and acquaintances as a member of his family. He paid to her, from time to time, various small sums of money, and, during the last six months of his life, in different amounts, the sum of \$1,000. She seems to have been a saving and prudent woman, for at the time of the death of the testator she had on deposit to her credit in bank the sum of \$3,000. During the life of the decedent she kept no books of account, made no demand for compensation, and nothing appears to indicate that the parties occupied any such relations to each other as master and servant or debtor and creditor. The plaintiff is described by the testator in his will as his adopted daughter, and in that instrument he made for her the following provisions: The sum of one thousand dollars absolutely, the income on \$8,000 during her life, and the use, during her life, of the homestead and land, consisting of one and a half acres, where he lived and died, together with the household furniture, fixtures, provisions and family supplies, and also the right, at her election, of burial in the family lot in the cemetery. These bequests not only show that the deceased intended to and did make substantial provisions for the comfortable support of the plaintiff, in view of his condition and circumstances in life, but also that the relations between them were regarded as that of parent and child rather than that of master and servant. The plaintiff brought this action against the executors to recover the value of her services for thirty-eight years, from the year 1852 to the year 1890, when the testator died, and the various sums received by the plaintiff, from time to time, are treated as payments upon the debt sufficient to avoid the Statute of Limitations. The answer,

besides putting in issue all the material facts upon which the claim is based, and interposing the Statute of Limitations as a bar, alleged payment and set up the provisions of the will as a defense. The learned referee before whom the cause was tried reported in favor of the defendants, and found, as a fact, that prior to the death of the testator it was mutually agreed between him and the plaintiff that the bequests and devises in her favor contained in the will, added to the payments and benefits received from him during his lifetime, should be in full payment, discharge and acquittance of all claims and demands by her for compensation for any labor or services rendered by her during the period stated in the complaint, except upon the contingency which both plaintiff and decedent stated that they feared might happen, that for any reason the will and codicil might fail to be admitted to probate. The will was admitted to probate, and the plaintiff claims all benefits under it, as well as the right to a recovery in this action. Assuming that this finding is warranted by the evidence, it imports that the plaintiff and the deceased agreed and intended that the provisions of the will, if they became operative, should discharge any debt that existed in her favor, and that no independent claim as a creditor should survive against the estate. (*Sheldon v. Sheldon*, 133 N. Y. 4.) These provisions having taken effect according to the intention of the parties, they furnish a complete defense to this action. We think that the finding was not only warranted, but was a reasonable and just conclusion from all the facts and circumstances disclosed upon the trial. The two persons who knew most about the actual facts could not testify. The mouth of one was closed by death and the other by the statutory disqualification, and the referee had to base his conclusions upon a variety of facts and circumstances that appeared in the case, as well as upon the testimony of several witnesses who were able to give more or less light in the progress of the inquiry. It is not necessary to comment upon the evidence or to point out the inferences which could properly be drawn from it. It is sufficient to say that, in our opinion, it amply justified the view taken by the referee as to the facts,

and under the limitations which the law has imposed upon the power of this court over the facts in controversy, the finding must be deemed conclusive.

The record contains numerous exceptions, many of which have been pressed by the learned counsel for the plaintiff, as grounds of reversal, with much force and earnestness. Most of them are obviously untenable, but a few are of sufficient importance to require some notice. The first objection is that the finding of fact upon which the referee based his legal conclusions in favor of the defendant was outside the pleadings. It is doubtless true that a material fact found by a court or referee must not only be sustained by proof but by pleading as well. But the defendants had pleaded payment generally, and under that defense were entitled to give proof of any agreement between the parties in the lifetime of the testator that operated to discharge the debt. It is not necessary generally to state the particular manner in which the obligation was extinguished. Any valuable consideration moving from the debtor to the creditor which the parties agree shall operate to satisfy the debt will be given that effect, in the absence of fraud or mistake, especially in the case of debts unsettled and unliquidated. When parties agree that a debt shall be deemed paid and satisfied by a provision in favor of the creditor in a will, and that provision is made and the creditor has received the benefit of it, I see no reason to doubt that the facts may be shown under a pleading alleging payment or satisfaction generally. But the referee at the trial, on the application of the counsel for the defendant, permitted the answer to be amended by alleging the agreement to compensate the plaintiff by provision for that purpose in his will, and another of the exceptions challenges the power of the referee at the trial to allow such an amendment under the Code (§§ 721, 722, 723). This amendment made no substantial change in the nature of the defense. It was but an amplification of the plea of payment originally set up by stating the manner in which it was made, and while perhaps unnecessary, the referee had power to allow it. The plaintiff's counsel com-

plains that this was done after the proofs were all in, upon some other theory. If the power existed the time and manner of its exercise was within the discretion of the referee, and it cannot be doubted that power existed to conform the pleadings to the proofs. (Code, §§ 539, 540, 541.) There was no claim that the plaintiff was in any way prejudiced by the amendment in the production of her proofs, and it does not appear that she made any application to open the case and give further proof, which was clearly within the power of the referee to grant. It is further urged that the answer, even as amended, or the proofs given, do not show that the provisions of the will were equivalent to the debt then due. The parties had the right to agree between themselves what was the plaintiff's just due. The claim was unliquidated and of such a character that it could be legally discharged by such an agreement as the referee found, and this agreement having been executed by the decedent and accepted by the plaintiff it operates to extinguish the claim. The agreement not only provided for the manner of payment, but in legal effect liquidated and adjusted the amount of the debt. The finding fairly implies that the nature, character and extent of the provisions for her benefit contained in the will were known by or communicated to the plaintiff before the death of the testator, and that with such knowledge she agreed to accept them in satisfaction of her claim. No change having been made in the will the plaintiff has now just what she agreed to take, and I see no reason why such an agreement does not bind her in law and equity.

At the trial one of the executors, defendants, who was also a residuary legatee under the will, was called and examined as a witness for the defense. He testified that in the early part of the month of October, before the death of the testator, he had a conversation with the deceased, in the presence of the plaintiff, in which, among other things, he told the witness what provisions he had made in his will in favor of the plaintiff, and also that she had accumulated already, by living in his family, four or five thousand dollars. This testimony was

objected to by plaintiff's counsel as incompetent under § 829 of the Code. The referee overruled the objection and the plaintiff excepted. The objection was not well taken. The witness gave testimony and was examined, not against but in favor of the personal representatives of the deceased, concerning a personal transaction or communication between him and the deceased, in the presence of the plaintiff. The executor was examined in his own behalf with respect to the conversation, and such testimony is not prohibited by this section of the Code. The plaintiff then became a competent witness to testify in her own behalf in regard to the same transaction and to deny or explain the testimony of the executor if she could. This section prohibits parties from giving testimony in their own behalf or interest *against* the personal representatives of a deceased person, concerning a personal transaction or communication with the deceased, but it does not prohibit an executor or administrator, who is a party to the suit, from being examined in favor of the estate touching such a transaction, when the adverse party was present participating, and when it is otherwise competent. It opens the door for the admission of testimony from adverse parties that would otherwise be excluded, but if the personal representatives of the deceased elect to take such risk they have the right to do so. This applies not only to the exception mentioned, but to some others appearing on the record, and it is, therefore, unnecessary to discuss them specially. The plaintiff's counsel offered to show by a witness that a person sitting at a table in the sitting room could not hear the conversation on the porch in front of the room between the deceased and the executor which the latter testified to. The referee excluded the proof offered and there was an exception. We do not think that this ruling presents such an error of law as calls for a reversal, for the reasons: (1) The plaintiff could have been sworn on this point, and could of course have settled the question, so far as she was concerned, whether or not she actually heard the conversation or was present as the witness said she was. (2) The location and distances were

fully described, and the referee could draw the conclusion as well as the witness. The question called for an opinion which depended upon so many conditions that it could not be regarded as anything more than mere speculation. (3) The testimony of the executor was that she was actually present, or at least at a door leading to the porch closed only by a wire screen, and the opinion of a witness as to whether she could or could not hear the conversation when located at another and more distant point in the room was not admissible. It is unnecessary to discuss the other exceptions in the case. They were correctly disposed of in the court below, and even if some of the rulings against which they were directed were open to criticism the plaintiff could not possibly have been prejudiced thereby.

The judgment should, therefore, be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

141	86
147	347
141	86
170	1815

THE PEOPLE ex rel. ANNA M. HOFFMAN, Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et al., Respondents.

While after appeal to this court, in all matters pertaining to the appeal itself and to the proper hearing of, as well as all applications which by statute may be made to this court, it has jurisdiction, as to all other applications the case is to be regarded as still pending in the court of original jurisdiction, and such applications should be made to that court.

Where, therefore, after appeal to this court the appellant's attorneys at her request substituted another in their place, *held*, that a motion for order directing the former attorneys to turn over the papers in the case to the substituted attorney was not properly made here, but should have been made in the court below.

(Argued January 15, 1894; decided January 23, 1894.)

THIS was a motion for an order directing the former attorneys of the relator to deliver to her present attorney certain papers.

Henry Schmitt for motion.

Nelson J. Waterbury and *Nelson J. Waterbury, Jr.*,
opposed.

Per Curiam. The relator retained attorneys in this proceeding, who appeared for her in the court below and who in her behalf appealed to this court from an adverse determination of the proceeding in that court. Subsequent to the appeal the relator's attorneys, at her request, substituted another in their place. The attorney thus substituted, upon an affidavit that he had demanded from the former attorneys certain papers in the case which they had failed to deliver, has noticed a motion in this court for an order directing the former attorneys to deliver such papers to him. They have, in opposition to such motion, presented an affidavit in which one of them swears that he has in fact delivered to the relator personally all the material papers in the case which could be found in their possession, and that the only papers left are some unimportant ones, such as notices of argument and old stipulations to put over the case.

This would probably be a sufficient answer to the motion if it were properly here for us to decide. But upon an appeal to this court the record itself is not transmitted, and the case, for all general purposes, still remains in the court of original jurisdiction. A transcript only of the record is sent here. In all matters pertaining to the appeal itself, and to the proper hearing thereof, this court has jurisdiction, and also in regard to all applications which by statute may be made to this court after the taking of an appeal, but as to all other applications the case is regarded as still pending in the court of original jurisdiction, and such applications should be made to that court.

The motion is, therefore, denied, with ten dollars costs, with liberty to renew in the court below if relator should be so advised.

All concur.

Motion denied.

ELIZABETH D. DE LANCEY, Respondent, v. HENRY PIEPGRAS,
Impleaded, etc., Appellant.

SAME, Respondent, v. SAME, Appellant.

SAME, Respondent, v. SAME, Appellant.

Where a party has obtained an undue advantage by using an order of the court for a purpose contrary to its spirit and intention, and which could and would have been guarded against had the unlawful purpose been disclosed when the order was made, the court has power to modify or amend the order, or grant a new order, to correct the abuse of the former one.

This court may not review even a void order in an action when it does not affect a substantial right.

After judgment in an action of ejectment an order was granted under the Code of Civil Procedure (§ 1525), setting aside the judgment and granting a new trial. Subsequently, on motion of defendant, an order was granted setting aside said prior order, amending and modifying the judgment and execution, with leave to apply again for leave to vacate the amended judgment for the purposes of a new trial, but refusing to set aside the execution, under which plaintiff had been put in possession. On appeal from the order, *held*, that it was one addressed to the discretion of the court below and so was not reviewable here. (Code Civ. Pro. § 190.)

After defendant had secured the amendment to the judgment and execution he again resumed possession of the premises and excluded plaintiff therefrom by force. Upon application of the latter, defendant was ordered forthwith to restore such possession, and thereafter to desist from any physical resistance or interference with plaintiff's possession. *Held*, that the making of the order was within the power of the court; that plaintiff was not required to resort to some new and independent action or proceeding to regain possession.

Reported below, 73 Hun, 607, 608, 610.

(Argued January 15, 1894; decided January 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 6, 1893, which affirmed an order of Special Term made on application of defendant Piepgras.

That order vacated a prior order setting aside judgment herein and granting a new trial, under section 1525 of the

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Code of Civil Procedure, modified and amended said judgment *nunc pro tunc*, amended execution to conform to the amended judgment, gave said defendant leave to renew his motion to vacate judgment and for a new trial, or to make such other application as he may be advised, but refused to set aside the execution.

Also, appeal in same action from order of same General Term, made December 6, 1893, which affirmed an order of Special Term, directing the defendant Henry Piepgras to restore to plaintiff and the defendant John Hunter possession of the premises described in the complaint.

Also, appeal in same action from order of same General Term, made December 6, 1893, which affirmed an order of Special Term denying a motion to set aside an order of Special Term, directing restoration of possession of the premises in suit to plaintiff and said defendant John Hunter.

This was an action of ejectment to recover possession of certain docks and lands under water at City Island, Westchester county. The case is reported on a former appeal (138 N. Y. 26).

The present appeals relate to orders subsequently made in carrying out the judgment.

The facts, so far as material to these appeals, are stated in the opinion.

George A. Black for appellant on first appeal. The power of the Supreme Court is limited. (Code Civ. Pro. § 194.) So far as the grant to Palmer was in derogation of the right of the upland owner it was void. (*De Lancey v. Piepgras*, 138 N. Y. 47.) The plaintiff's contention is that the moment Piepgras or his grantors erected a wharf, or built a marine railway, that moment the exception as to the parts of the premises on which wharves or buildings are erected took effect. This is untenable. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *St. Louis v. Rutz*, 138 U. S. 246; *I. C. R. R. Co. v. Illinois*, 146 id. 387; *Smith v. Levinus*, 8 N. Y. 473.) As the owner of the upland has the right to build a dock or obtain

access to the navigable waters of the channel by marine railways, this right, which is declared by all the cases to be valuable and to be his property, cannot be taken from him by the state making a grant of its title to the land under water to an individual. Every such grant must be subject to the same rights of the riparian proprietor, and cannot, as said in the above case, "authorize A. to erect a wharf in front of the lands of B." (*Pearsall v. Post*, 20 Wend. 132; 22 id. 425.) Piepgras' riparian rights are appurtenant to the ownership of the upland, and inseparable therefrom. (*B. M. Co. v. B. I. Works*, 129 N. Y. 155; *People ex rel. B. v. Comrs. of Land Office*, 135 id. 447; *I. C. R. R. Co. v. Illinois*, 146 U. S. 445; *Saunders v. N. Y. & H. R. R. Co.*, 71 Hun, 160.) The judgment of the Court of Appeals should be enforced according to law. (*White's Bank v. Nichols*, 64 N. Y. 65; *Holloway v. Southmayd*, 139 id. 402; 138 id. 415; *City of Cincinnati v. White*, 6 Pet. 442.) The only judgment the Supreme Court had a right to enter was one in strict conformity to the judgment of this court, and it had no power to issue an execution which did not strictly conform thereto. (*Ruckman v. Cowell*, 1 N. Y. 505; *Kerr v. Mount*, 28 id. 658.) The execution was void for statutory defects. (Code Civ. Pro. § 1366.) The Special Term had no power to amend the execution. (*In re Bradner*, 87 N. Y. 171.) The Special Term, in amending the execution, acted of its own motion, and in that respect was without authority. (*Wheeler v. Emeluth*, 121 N. Y. 241; *Alexander v. Esten*, 1 Caines, 152.) The motion to set aside this void execution involved a substantial right and was fully authorized. (*Kamp v. Kamp*, 59 N. Y. 223; *Douglas v. Huberstro*, 88 id. 618; *People v. Ames*, 35 id. 482.)

George A. Black for appellant on second appeal. The power of the court to grant an injunction by order is strictly statutory. (*E. R. Co. v. Ramsey*, 45 N. Y. 637.) The Code gives the power to grant an order in the cases therein specified, with an exception which excludes this case. (Code Civ.

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Pro. § 1675.) Upon the merits the court should not have made the order. (*De Lancey v. Piepgras*, 138 N. Y. 47; *Rumsey v. R. R. Co.*, 133 id. 79; *White's Bank v. Nichols*, 64 id. 65.)

George A. Black for appellant on third appeal. The court had no jurisdiction to make the order of July 22, 1893, and it was consequently void and should have been vacated. (*E. R. Co. v. Ramsey*, 45 N. Y. 637; *Spears v. Matthews*, 66 id. 127; Code Civ. Pro. §§ 194, 1240, 1364, 1366, 1373.) The right to enjoin is limited to the statutory cases, and is not made a substitute for contempt proceedings by any provision of law. (*Matter of an Attorney*, 83 N. Y. 168.) Whatever legal rights Piepgras has the court was bound to accord him even though it involved the determination that another judge had exceeded his jurisdiction. (*People v. Liscomb*, 60 N. Y. 570; *People v. Frey*, 100 id. 24; *Ferguson v. Crawford*, 70 id. 263; *Kamp v. Kamp*, 59 id. 212.)

Walter D. Edmonds and *John Hunter, Jr.*, for respondents on first appeal. This appeal should be dismissed, because the order appealed from was in all respects within the power and discretion of the court below, and did not affect a substantial right. (*Bank of Genesee v. Spencer*, 18 N. Y. 150, 151, 152, 154; *Underwood v. Green*, 56 id. 247, 249; *Bennett v. Morehouse*, 42 id. 189, 191; *Whitney v. Townsend*, 67 id. 40, 43; *Van Slyke v. Hyatt*, 46 id. 259, 262; *Arthur v. Griswold*, 60 id. 143, 146; *N. S. & L. Bank v. M. N. Bank*, 89 id. 441.) The judgment of the Supreme Court, entered June 26, 1893, strictly complied, in all matters of substance, with the judgment of this court and the directions contained in its remittitur; therefore, appellant could sustain no injury by reason of the execution issued in conformity with said judgment. (138 N. Y. 47.) The unanimous refusal of all the judges below to set aside the execution and proceedings thereunder was proper. (Code Civ. Pro. §§ 1373, 1529; 64 N. Y. 65.) The amendment of the execution *nunc pro tunc* was within the power of

the court and no abuse of its discretion. It affected no substantial right and is not appealable. (*Strong v. City of Brooklyn*, 68 N. Y. 1, 11; Code Civ. Pro. §§ 721, 722, 723; *Douglas v. Haberstro*, 88 N. Y. 611, 618; *N. Y. I. Co. v. N. W. Ins. Co.*, 23 id. 351, 361; *Bank of Genesee v. Spencer*, 18 id. 150.) The order of July 17, 1893, appealed from, was proper, because the execution, in its original form, as well as the proceedings had thereunder, were incapable of injuriously affecting any of the appellant's substantial rights. (*Morgan v. Moore*, 3 Gray, 319; *Bakeman v. Talbot*, 31 N. Y. 366; *Filmes v. Marsh*, 67 Penn. St. 507; *Atkins v. Boardman*, 2 Metc. 457.) Appellant herein is not entitled to invoke on his behalf as against the title of the respondent any supposed doctrine of easement arising incidentally out of his pretended ownership of riparian upland. (*Hoboken v. P. R. R. Co.*, 124 U. S. 656; *I. C. R. R. Co. v. Illinois*, 146 id. 387; *Williams v. Mayor, etc.*, 105 N. Y. 419; *People v. S. I. F. Co.*, 68 id. 78, 79; *Langdon v. Mayor, etc.*, 93 id. 129, 155; *People v. Canal Appraisers*, 33 id. 461, 467; *B. M. Co. v. B. I. Works*, 129 id. 155, 159.)

Walter D. Edmonds and *John Hunter, Jr.*, for respondents on second appeal. This appeal should be dismissed, because the order in question is not appealable to this court. (*Dunlop v. Edwards*, 3 N. Y. 341, 343; *Jones v. Derby*, 16 id. 242, 244, 245; *Bank of Genesee v. Spencer*, 18 id. 150, 152.) The Supreme Court had power and jurisdiction to make the order appealed from. It was well within the inherent jurisdiction of the court as it is organized under the Constitution. (*Youngs v. Carter*, 10 Hun, 194; *People v. Bd. Suprs.*, 39 id. 299; Code Civ. Pro. §§ 7, 14, 1364; *People v. Nichols*, 79 N. Y. 582; *Curtis v. Hubbard*, 4 Hill, 437; *Wilbur v. Donalds*, 59 N. Y. 657; *King v. Barnes*, 113 id. 476; *A. Ins. Co., v. Fisk*, 1 Paige, 90.) Appellant is entitled to no consideration on the merits. (138 N. Y. 47.)

Walter D. Edmonds and *John Hunter, Jr.*, for respondents on third appeal. This appeal should be dismissed, because the

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order appealed from was in all respects within the power and discretion of the court below, and did not affect a substantial right. (*Bank of Genesee v. Spencer*, 18 N. Y. 150; *Underwood v. Green*, 56 id. 247, 249; *Bennett v. Morehouse*, 42 id. 189, 191; *Whitney v. Townsend*, 67 id. 40, 43; *Van Slyke v. Hyatt*, 46 id. 259, 262; *Arthur v. Griswold*, 60 id. 143, 146; *N. S. & L. Bank v. M. N. Bank*, 89 id. 441.) The motion of August 3, 1893, to vacate and set aside the order of July 22, 1893, was properly denied both upon the law and the merits. The order should not be reviewed by another judge at Special Term. (*Fisher v. Hepburn*, 48 N. Y. 41, 52, 53; *Kamp v. Kamp*, 59 id. 212, 217.) The question of jurisdiction had already been passed upon. (*Wilcox v. Jackson*, 13 Pet. 571.)

O'BRIEN, J. The rights of the parties to this action have been determined by this court when it was here on a former appeal, in so far as their claims were then presented. (138 N. Y. 26.) In carrying out the judgment which was the result of that appeal, further controversies have arisen, and we are now asked to review three different orders made after judgment in the case. While there are three distinct appeals, yet the orders are all so related to each other that they can be more conveniently considered as one. The facts in the main case and the legal questions involved are very fully disclosed in the elaborate opinion on the former appeal. Our judgment, then rendered, having been remitted to the Supreme Court, the parties appeared before the Special Term, in pursuance of a notice, and the court then inserted in the judgment the modification required by the decision, not in the words of the royal grant to Palmer, but, as was held, according to its substance and legal effect. Final judgment having been entered on the 19th day of June, 1893, an execution requiring the sheriff to put the plaintiff in possession of the real property, which was the subject of the controversy, was issued and delivered to him on the 26th of June, 1893, and on that day the sheriff executed the process by delivering the possession to the plaintiff.

On the 3d of July, following, the judgment was vacated, upon the application of the defendant, for the purpose of a new trial under the provisions of § 1525 of the Code. This order permitted the defendant to re-try every question involved in the issues, including the one which he now seeks to settle in a motion. The judgment and execution had then been fully executed, the plaintiff had been put into possession, and the way was open to the defendant for another trial. It is to be inferred from what took place subsequently, that about this time the defendant's counsel reached the conclusion that the judgment and execution, under which the plaintiff had recovered the property, were unauthorized by our decision, and that the proceedings of the sheriff in dispossessing the defendant were irregular. On the 17th of July he applied to the court for leave to vacate his own order granting him a new trial and to reinstate the judgment in order to enable him to apply for a modification of the judgment, conforming it, as he claimed, to the decision of this court, and also to vacate the execution, and all the proceedings under it, as irregular and unauthorized. If this motion had been successful the result would be to restore the property to the defendant, and thus practically to reverse all that had been done. The court was not only asked to do all this, but when done to again vacate the judgment for the purpose of another trial under § 1525. This application resulted in the first order which we are now asked to review. The court set aside the prior order vacating the judgment and granting a new trial. It modified and amended *nunc pro tunc* the judgment of June 26th by inserting *in ipsoissimis verbis* the proviso in the Palmer patent. It amended the execution *nunc pro tunc* by conforming it to the amended judgment, and denied the other relief with leave to apply again to vacate the amended judgment for the purpose of another trial. The question that the learned counsel for the defendant has pressed here with great earnestness is this, as we understand it. He claims that the defendant, notwithstanding the judgment, has still certain easements or riparian rights in or over the land which was the subject of this action that were

ignored by the sheriff in delivering absolute possession to the plaintiff. In other words, he contends that the defendant, in virtue of his ownership of the uplands, has still, in respect to the premises in question, all the rights which this court has held pertain to riparian proprietorship. (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79.) This question was involved in the issue, and could have been litigated at the trial, but it was not, nor was it presented upon any of the appeals. There would be serious objection to the consideration of such a question in the way that it is now presented, and at this stage of the controversy, even if the defendant was not entitled to another trial. But as a party to an action for the recovery of real property is entitled to such a trial, it would be manifestly unwise to determine questions of such importance upon a motion in advance of the trial, even if our jurisdiction in this respect was conceded. The motion which the defendant made, resulting in the order appealed from, was one addressed to the discretion and favor of the court. It was an application to vacate his own order granting another trial, asserting at the same time that when the judgment and execution were disposed of in the manner requested, he would again apply to set aside the vacating part of the order. The court was not bound to grant such a motion. It could entertain it or not in the exercise of discretion. It granted the favor asked with certain amendments, qualifications and conditions which are not open to review in this court. The only power that this court has must be found in the second and third subdivisions of § 190 of the Code. We have power to review certain orders there specifically mentioned when they involve some substantial right and do not rest in discretion, but we can review no others. It would be difficult to show that this order involves a substantial right or a question of practice, or that it was made upon a summary application after judgment. But, however that may be, it was clearly one which resulted in the exercise of discretion, and that fact renders the decision of the General Term final. (*In re Waverly Water Works*, 85 N. Y. 478; *Tyng v. Halsted*, 74 id. 604; *Quimby v. Claffin*, 77 id. 270.)

The next order was made by the court on the 22d of July, 1893, under the following circumstances: It appears that after the defendant secured the amendment to the judgment and execution above referred to, he again resumed the possession of the premises embraced in the judgment, and excluded the plaintiff therefrom by force, and upon the application of the plaintiff he was ordered, forthwith, to restore such possession, and in the future to desist from any forcible or other physical resistance to or interference with the enforcement of the execution, or the officers of the court, or the plaintiff's possession. It is urged that the court in making such order exceeded its powers. It is true that the ordinary way to enforce the mandate of the court in such cases is through the sheriff, who may call to his aid the power of the county. (Code, § 104.) But where resistance is made to the execution of the process the resisters may be punished as for a contempt. (§ 105.) The Supreme Court has general jurisdiction in law and equity, and possesses inherent powers for the purpose of enforcing respect for and obedience to its judgments, not necessarily expressed in fixed precedents or statute law. It may be difficult to define this power, and it might be dangerous to apply it arbitrarily or in doubtful cases. The parties to the action were still subject to its jurisdiction, and the conduct of the defendant, as disclosed by the record, was such as to justify the court in using all the power it had to uphold its dignity and authority. It had the power to punish the defendant for contempt in case of resistance, and if so, the power to employ some milder method of correction would seem to follow as a reasonable implication. If the defendant in an action of ejectment may, after the plaintiff has been put in possession, return and resume the possession by force, after a short interval of time, in defiance of the judgment, and the plaintiff has no remedy except a resort to some new and independent action or proceeding, then there is at once revealed an obvious defect in our methods of administering justice in such cases. The power of the court to prevent and punish resistance to the execution of its judgments and decrees is not

exhausted until the purpose for which the judgment was rendered has been completely attained. It is true that a judgment for the recovery of the possession of real property is to be enforced under the Code by execution, but the question as to the power of the court to interpose in aid of that process while resistance is made or threatened to the duty imposed upon the sheriff is not necessarily excluded. It is a fair inference from the facts disclosed that the real purpose of the defendant in applying for an amendment of the judgment and execution, was to establish some ground for resuming the possession under a claim of some easement or riparian right. It is not now important to determine whether his claim was well founded or not, as he had no right, even if it was, to assert it by excluding the plaintiff from possession or by such a mode of procedure. Whatever may be the general rule with respect to the power of the court to aid by order the action of the sheriff in delivering possession to the successful party, and making such delivery effective and complete, in such cases, it is apparent that this case stands upon peculiar facts and circumstances. The defendant took advantage of a favor granted by the court in amending the judgment and execution by forcibly resuming the possession in contempt of the judgment. Had this purpose been disclosed when he was before the court asking the favor it might well have been refused or granted only upon the condition that no attempt would be made to disturb the plaintiff's possession, which had been awarded to her by the judgment and secured by the execution. When the real purpose of the amendments was disclosed to the court it had power to amend or modify its former order and insert in it any conditions which might have been inserted in the first instance. In short, before granting the favor which the defendant asked, it had the power to incorporate into it as a condition all the substantial provisions of the mandatory order appealed from by forbidding any attempt to resume possession and directing that possession be restored if then resumed. Whatever power the court had originally it could exercise and make effective

subsequently when informed that its favor amending the judgment and execution had been abused by the forcible exclusion of the plaintiff from the possession in defiance of the judgment. The court had been induced to make an order which was used for a purpose never intended, and which would have been forbidden if that purpose of the defendant had been disclosed. Under such circumstances the court, in vindication of its own dignity and for the protection of the rights of the parties, had the power to undo all the mischief resulting from the modification of the judgment and execution which it had been induced to make, and the order appealed from may be regarded as made for that purpose and under this general inherent power. It cannot, I think, be doubted that when a party obtains an undue advantage by using an order of the court for a purpose contrary to its spirit and intention, and which could and would have been guarded against had the unlawful purpose been disclosed when the order was made, that the court has power to deprive him of this advantage, resulting from an abuse of the order, by modifying or amending it, or granting a new order to correct the abuse. It seems to me that the power of the court to make the order in question can be upheld upon this principle, and having the power the manner of its exercise was in its discretion.

But if it be conceded that the order was made with out power it would not follow that this court can review it. We cannot review even a void order in an action unless it affects a substantial right. Now, what substantial right of the defendant did this order affect? He certainly had no right to resume possession by a strong hand after he had been removed by force of the execution, nor had he any right, by the use of force or threats, or any other device, to attempt to nullify the purpose of the judgment, and the order only commands him to submit to the decree of the court and to the action of the sheriff in carrying it out. If it be true, as urged by the learned counsel for the defendant, that such an order finds no warrant in any statute or rule of law, the fact still

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remains that it commanded nothing that the defendant was not bound to do without it. Granting that there was no power in the court at this time, or any other stage of the action, to command the defendant to obey in good faith the judgment and the execution, what possible harm, in any just or legal sense, has it done defendant? It interfered with no right that he had or that he now claims, and if void, as contended, it was wholly ineffectual for any purpose. The only effect that it could have, under any circumstances, would be to suppress unlawful and wrongful resistance to the process of the court on the part of the defendant, but surely this does not affect any substantial right. On the defendant's theory it was not even effectual for that purpose, unless he concluded to obey it, and adopt the line of conduct that it suggested, which he was bound to do if it had never been granted. The third order was made on August 3, 1893, upon the defendant's application to the Special Term held by another judge, to vacate the order last considered, and which application was denied. This order, therefore, must stand or fall for the same reasons as the preceding one. If the court had the power to make the prior order, then the necessity or propriety of setting it aside was matter of discretion. If it was without power, and no attempt having been made to enforce it by proceedings for contempt or otherwise, or if the defendant has elected to obey it voluntarily, it cannot be said that it affects any substantial right. We are, therefore, of the opinion that none of the orders appealed from affect a substantial right not resting in discretion within the meaning of § 190 of the Code, and that all the appeals should be dismissed, with one bill of costs in this court.

All concur except, EARL, J., who dissents as to the second order.

Appeals dismissed.

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HENRY H. ISHAM, as Trustee, etc., Respondent, v. MARY E. Post, as Administratrix, etc., Appellant.

P., defendant's testator, was a private banker in New York city; by circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Plaintiff employed P. to loan for him \$25,000, which the latter agreed to do gratuitously; he loaned the money, taking as collateral certain certificates of corporate stock, which had by a forgery been raised so as to represent a larger number of shares than they were issued for, and in consequence a loss resulted. In an action to recover damages, *held*, that the fact that the services of P. were rendered gratuitously did not free him from the obligation to exercise such diligence as he had promised to those dealing with him, nor was he at liberty to withhold from his agency the exercise of the skill and knowledge he held himself out to possess, and so, if the loss resulted from failure to exercise ordinary skill and knowledge, he was liable.

Plaintiff proved the delivery to P. of the amount specified, to be loaned and returned on demand, and that the latter refused to return the same on proper demand. *Held*, that the burden was upon defendant of proving affirmatively that P. did his duty fully and faithfully and without negligence or misconduct, and so that the loss was without his fault.

It appeared that the loan was made to a firm in good repute and standing at the time; that the original certificates were genuine and lawful, and had been issued six years previously to a member of the firm, who had executed the usual blank assignments enabling them to pass from hand to hand, and were attested by his firm. The loan was made by P.'s managing clerk, who had had an extensive experience in such transactions, and had handled many of the certificates of the company whose stock was taken as collateral. The clerk took the certificates without close or careful scrutiny. The trial court found that P. was negligent in making the loan upon the security of the certificates, on the ground that he took them without examination, without presenting them for verification at the office of issue or registry and without inquiry as to the solvency of the borrowing firm. *Held*, that the care P. was bound to exercise did not require him to make inquiries or present the certificates for verification, but as to the omission to give the certificates a proper examination the finding could not be held error as matter of law.

Defendant offered to show that P. lent \$50,000 of his own money, accepting as collateral similarly raised certificates; also that the certificates in question had been given and received on the street as collateral for loans, and deceived the skill of a great number of bankers and brokers who took and held them without suspicion. This testimony

was objected to and excluded. *Held*, error, as the proof, if made, would have shown good faith on defendant's part and would have excused and justified the failure to discover the forgery.

Isham v. Post (71 Hun, 184), reversed.

(Argued December 21, 1893; decided January 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as trustee, to recover of Augustus T. Post the sum of \$25,000 alleged to have been placed in his hands to be loaned for plaintiff and to be returned on demand. After the death of Post the action was revived and continued against his administratrix.

The facts, so far as material, are set forth in the opinion.

Alfred Ely for appellant. Mr. Post acted only as Mr. Isham's agent in the whole matter of loaning the \$25,000 referred to in the complaint, and in all that he did Mr. Post acted within the scope and intention of his employment as agent. (*Lambert v. Heath*, 15 M. & W. 484; *Peckham v. Ketchum*, 5 Bosw. 506.) The \$25,000 delivered by Isham to Post was not chargeable with any trust in Mr. Post's hands. (*Atty.-Gen. v. L. Ins. Co.*, 71 N. Y. 325; *Risley v. P. Bank*, 83 id. 324; *O'Connor v. M. Bank*, 124 id. 331; *Gerard v. McCormick*, 130 id. 267; *Duncan v. Jordan*, 15 Wall. 255; *Shaw v. Spencer*, 100 Mass. 382; *M. N. Bank v. Hall*, 83 N. Y. 338.) Mr. Post was responsible in any event only for ordinary care and liable only for gross negligence. (Story on Bail. §§ 179, 180-183; *Shiels v. Blackburne*, 1 H. Black. 158; *Beardsley v. Richardson*, 11 Wend. 25; *Tompkins v. Saltmarsh*, 14 S. & R. 275; *Finnucane v. Small*, 1 Esp. 315; *Foster v. E. C. Bank*, 17 Mass. 478.) The exercise of ordinary care did not require Mr. Post to verify these certificates at the office of the company. (*Lamb v. C. & A. R. R. Co.*, 46 N. Y. 279; *Leitch v. Wells*, 48 id. 585; *N. Y. & N. H.*

R. R. v. Schuyler, 34 id. 30; *McNeil v. Bank*, 46 id. 325; *F. A. Bank v. R. R. Co.*, 137 id. 231; *Bank v. Lanier*, 11 Wall. 377.) The acceptance of the certificates in question as collateral for Mr. Isham's loan was not negligence on Mr. Post's part. (*White v. C. Bank*, 64 N. Y. 316.) Any presumption of negligence on the part of Mr. Post is rebutted by the fact that he treated Isham's money in the same way as he did his own. (Jones on Bail. 63; Story on Bail. § 183; *Shiels v. Blackburne*, 1 H. Black. 159, 1789; *Finnucane v. Small*, 1 Esp. 315, 1794; *Foster v. E. C. Bank*, 17 Mass. 478.) Mr. Post is not liable because he expressly exempted himself from liability by specific agreement to that effect with Mr. Isham at the time he undertook the loan. (Story on Bail. [9th ed.] 166; *Loeb v. Hellman*, 83 N. Y. 601; *Bell v. Dagg*, 60 id. 530.) Of the seven certificates four were genuine in every respect, and the forgery in the other three was not apparent. It had escaped detection for years. Moreover, the forgery was not of any signature, but was an alteration of the body of the instrument, after it had been issued, which Mr. Post was neither expected nor bound to discover. (*Bank of Commerce v. U. Bank*, 3 N. Y. 230; *White v. C. Bank*, 64 id. 316.) Mr. Post, as a gratuitous bailee, was not a guarantor. He had, in addition, expressly stipulated to the contrary. (*Bell v. Dagg*, 60 N. Y. 530.)

Frederic A. Ward for respondent. The rule is well settled and inflexible that in all dealings in negotiable securities there is an implied warranty on the part of the one proffering them, whoever he may be, as a part of the agreement, that such securities are genuine and not forged. (*Delaware Bank v. Davis*, 20 N. Y. 228, 229; *Littauer v. Goldman*, 72 id. 506; *Webb v. Odell*, 49 id. 583; *M. N. Bank v. Gallaudet*, 120 id. 303; *Goddard v. M. Bank*, 4 id. 147-152; *Welsh v. G. A. Bank*, 73 id. 424-426; *Weisser v. Dennison*, 10 id. 75; *N. P. Bank v. N. N. Bank*, 46 id. 77-80; *Turnbull v. Bowyer*, 40 id. 450-460; *Otis v. Cullum*, 2 Otto, 447; *Osborn v. Nicholson*, 13 Wall. 654.) If the transaction be

viewed as a loan made by Post for the account of the plaintiff as principal, the same rule applies. Moreover, so long as Mr. Post conducted the transaction in his own name, without giving up or disclosing his principal, or securing his adoption of the loan, he made himself debtor to the trust estate and took the risks of the transaction. (*Morrison v. Currie*, 4 Duer, 79; *Holt v. Ross*, 54 N. Y. 478; *Bank of Commerce v. U. Bank*, 3 id. 230; *K. Bank v. Eltings*, 40 id. 391, 396; *Frank v. Lanier*, 91 id. 112; *G. Bank v. S. Bank*, 17 Mass. 33, 41; *U. S. Bank v. Bank of Georgia*, 10 Wheat. 351.) Upon defendant's claim that Mr. Post's only liability was for negligence in the course of his agency, the plaintiff's case is made out unanswerably by the proofs. (*Whitney v. Martine*, 88 N. Y. 535; *G. Bank v. S. Bank*, 17 Mass. 33; *Bank of Commerce v. U. Bank*, 3 N. Y. 236; *Gerard v. McCormick*, 130 id. 267; *Shaw v. Spencer*, 100 Mass. 382; *Gibson v. N. P. Bank*, 98 N. Y. 94; *Fellows v. Longyor*, 91 id. 324.) Upon the notice imparted by the check and the two accounts kept by defendant, one with plaintiff individually and one with him as trustee, defendant's intestate was chargeable with knowledge that he had absolutely no right to loan these trust moneys upon such securities as he accepted without the written consent of the *cestuis que trust*, and that he did so at his peril. (*Gerard v. McCormick*, 130 N. Y. 267, 268; *Sturtevant v. Jacques*, 14 Allen, 523; *Shaw v. Spencer*, 100 Mass. 382; *Budd v. Munroe*, 18 Hun, 316; *Brewster v. Lime*, 42 Cal. 139; *Thompson v. Toland*, 48 id. 99.) The judgment appealed from must be sustained for the reason, not adopted by the court, but fully sustained by the conceded and undisputable facts of the case (some of which have been found and some not), that the loan in question was not a lawful use or investment of trust moneys, but a wrongful and illegal use thereof on the part of Augustus T. Post. (*Gerard v. McCormick*, 130 N. Y. 267; *C. Bank v. Delano*, 48 id. 340; *Williamson v. Brown*, 15 id. 354; *Baker v. Bliss*, 39 id. 70; *Bridgman v. Gill*, 24 Beav. 302, 306; *Fellows v. Longyor*, 91 N. Y. 331; *Budd v. Munroe*, 18 Hun, 316, 318;

Holden v. N. Y. & E. Bank, 72 N. Y. 294; *Boddenham v. Hoskins*, 2 De G., M. & G. 903; *Foxton v. M. Bank*, 44 L. R. L. S. 406-408; *Atty.-Gen. v. Leicester*, 7 Beav. 176, 180; *Deobold v. Oppermann*, 111 N. Y. 538.) The claim of the defense that the transaction in question was a gratuitous bailment and that, as gratuitous bailee, defendant's intestate was only liable for gross negligence, cannot be sustained either as matter of law or as matter of fact. (*Andrews v. Richmond*, 34 Hun, 16-23; *Mallory v. Willis*, 4 N. Y. 76; *Foster v. Pettibone*, 7 id. 433; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Deobold v. Oppermann*, 111 N. Y. 532.) None of the exceptions were well taken. All of the rejected testimony was immaterial in any view of the case and especially in view of the decision made. (*Hun v. Carey*, 88 N. Y. 66; *Hopper v. Sage*, 112 id. 530; *Watts v. Bailey*, 49 id. 464, 472; *Harris v. Tumbidge*, 83 id. 92; *Gerard v. McCormick*, 130 id. 267; *Shaw v. Spencer*, 100 Mass. 382.) The complaint in the suit was properly dismissed, and it is only in the view of defendant's liability that its discussion is of any importance. (*Sherman v. Wright*, 49 N. Y. 227, 231; *Fellows v. Longyor*, 91 id. 324, 330; 2 Perry on Trusts, §§ 811, 843; *Kowing v. Manly*, 49 N. Y. 202; *Deobold v. Oppermann*, 111 id. 538; Code Civ. Pro. § 449; *Dannelly v. West*, 17 Hun, 568; *W. R. R. Co. v. Nolan*, 48 N. Y. 513; *Holden v. N. Y. & S. Bank*, 72 id. 297.)

Clarence D. Ashley for *cestuis qui trustent*, respondents. Post had notice that Isham was a trustee using trust funds, and was bound to ascertain what the trust was at his peril. (*Fellows v. Longyor*, 91 N. Y. 324; *Shaw v. Spencer*, 100 Mass. 382; *F. N. Bank v. Lange*, 21 Md. 138.)

FINCH, J. The relation between the parties to this controversy must be regarded as that of principal and agent. Post was a banker; not a member of the Stock Exchange and so bound by its rules, but familiar with its customs and usages and controlled by them to some extent whenever dealing with stocks in the Wall street market. He held himself out to

the business world in that character. By his circulars he advertised himself as dealing in "choice stocks" and promised his customers "careful attention" in all their financial transactions. Those who dealt with him contracted for and had a right to expect a degree of care commensurate with the importance and the risks of the business to be done, and a skill and capacity adequate to its performance. That care and skill is such as should characterize a banker operating for others in a financial center, and different in kind from the ordinary diligence and capacity of the ordinary citizen. The banker is employed exactly for that reason. Without it there might cease to be motives for employing him at all.

Isham was the trustee of an express trust, but in this dispute must be regarded simply as an individual, and without reference to his trust character. For the trial court has found as a fact that, in employing the banker to loan for him twenty-five thousand dollars, he gave no notice of the trust character attaching to the money, contracted apparently for himself, and left Post to believe and be justified in believing that the money was his own. The evidence on the subject admits of some difference of opinion, but on this appeal the finding must control.

In the same way the question whether Post's services in making the loan were or were not to be gratuitous must be deemed settled. The finding is that those services were to be without compensation; and on that ground the appellant claims that Post was a gratuitous mandatary and liable only for gross negligence. But, while no compensation as such was to be paid, it does not follow that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess. Nothing in general is more unsatisfactory than attempts to define and formulate the different degrees of negligence, but even where the neglect which charges the mandatary is described as "gross," it is still true that if his situation or employment implies ordinary skill or

knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. (Story on Bailments, § 182 *a*; *Shiells v. Blackburne*, 1 H. Black. 158; *Foster v. Essex Bank*, 17 Mass. 479; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 295.) In the latter case it was said that ordinary care as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property and the risks to which it is exposed. Post, therefore, was required to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his promise of careful attention, and because the contract was made in reliance upon his business character and skill.

We should next consider upon whom rested the burden of proof. The plaintiff alleged and proved that he put into Post's hands, as his banker and agent, to be loaned upon demand at the high rates of interest prevailing and in the mode approved by custom and usage, the sum of twenty-five thousand dollars, which sum Post had not returned, but refused to return upon proper demand, and so had converted the same to his own use. That made out plaintiff's case. Judgment for him must necessarily follow, unless Post in answer has established an affirmative defense. That which he pleaded and sought to prove was that the money was lost without his fault and through an event for which he was altogether blameless. In other words, he was bound to show that he did his duty fully and faithfully and without negligence or misconduct, so that the resultant loss was not his, but must justly fall upon the plaintiff. (*Marvin v. Brooks*, 94 N. Y. 75; *Ouderkirk v. C. N. Bank*, 119 id. 267.) With that burden resting upon him, we must examine his defense and the evidence given in its support, and determine whether or not it is our duty to sustain the adverse conclusion, to reverse which he brings this appeal.

The trial court has found that Post was negligent in making

the loan upon the security of the certificates of stock taken as collateral, which had been raised by a forgery to indicate a larger number of shares than was the actual truth. Negligence is usually a mixed question of law and fact, and is never purely one of law unless the facts are wholly undisputed and admit of no conflicting inferences. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47.) In the face of the finding referred to we cannot reverse this judgment unless it clearly appears that upon no possible view of the facts, and upon no inferences deducible from them, can proof of negligence be found, or unless, in reaching the result, some material error in the admission or exclusion of evidence has affected the judgment rendered.

The finding of negligence, by its terms, rests upon three omissions. The admitted cause of the loss was a forgery of the number of shares of the stock given as collateral on the loan by raising that number in one certificate from seven shares to seventy, in another from eight to eighty and in a third from three to ninety-three. The certificates were the genuine and lawful certificates of the company when issued, signed and attested by the proper officers, and defective only in the forgery which raised the number of the shares. The loan was made to Mills, Robeson & Smith, who were in good repute and standing at the time, but failed two days later for a very large amount. The trial court asserted Post's liability upon the ground that he took the certificates without examination, without presenting them for verification at the office of issue or of registry, and without inquiry as to the solvency of the borrowing firm.

Assuming, as the court held, and as the facts of the agency appear to justify, that Post was bound to exercise in making the loan ordinary care, such as belonged to his business as a banker and to the duty he attempted to perform, we must consider the alleged omissions upon the facts disclosed in the record. In so doing we may dismiss the claim of negligence as inferred from the omission to inquire as to the solvency of the borrowers. There is no proof that inquiry would or could have developed any different information from that which

Post already had. There is no hint of any unfavorable rumors preceding the failure, or of any doubt in any quarter of the solvency of the borrowing firm; but, on the contrary, the undisputed evidence is that they were reputed to be solvent and responsible when the loan was made. There is no indication that inquiry would have yielded to Post any different information from that which he already possessed, or would have furnished the slightest reason for refusing the loan. There was certainly no negligence in omitting a new and further inquiry.

Nor do I think that ordinary care required Post, before accepting the certificates, to have presented them for verification, if there was nothing on their face calculated to arouse suspicion. They had been issued, as appears by their dates, more than six years before the loan was made, but had been issued directly to Smith, who was one of the borrowing firm, and of course knew that they were genuine when the stock was transferred to him on the company's books. He had executed the usual blank assignment which enabled them to pass from hand to hand, and which had been attested by his firm, and no suspicion could attach to them except upon a doubt of Smith's integrity, which no known fact warranted. There is no proof that it was ever a habit or custom for bankers or brokers to present such certificates for verification, and it is quite obvious that the business methods of Wall street do not admit of such a custom, suggest no necessity for its existence, and would be badly hindered and hampered by such a regulation; so that I am of opinion that, in ordinary cases, and at least where the official signatures are genuine, and nothing in the body of the certificates reasonably awakens suspicion, it is not evidence of negligence that the stock was taken as collateral without verification at the company's office. Where there is nothing in the surrounding facts or on the face of the paper to create a doubt it would be an instance of great and extraordinary care to present them for verification, and much beyond the degree of diligence required of Post in the present case.

There remains only the alleged omission to give the certificates a reasonable examination. I am inclined to regard that question as sufficiently debatable to prevent our treating it wholly as a question of law. And that is true partly because of some serious conflict in the testimony, but mainly because of the inherent character of the inquiry, which is much more one of fact than of law. The evidence fairly indicates that Post personally never saw the certificates when the loan was made. In all his correspondence with Isham and when standing on his defense he made no such claim, but himself said he trusted too much to his clerks. Isham in one of his letters reminds Post of his having made that remark, and the latter does not dispute it. And as matter of fact the loan was negotiated and consummated by his managing clerk, Shephard, who was fully examined as a witness, and did not claim or pretend that he showed the certificates to Post at all. But Shephard was not incompetent. Enough appears in the evidence to indicate that he possessed the necessary skill and knowledge to properly perform the duty assigned to him. He held a responsible position in Post's office, had an extensive and valuable experience, succeeded to Post's business on his death, and testifies that he was familiar with and had handled very many of the certificates of the company whose stock was taken as collateral. We are not justified in saying that he did not examine the forged certificates at all, and the finding of the trial court cannot mean that. What it must mean in view of the facts is that he gave them no close and careful scrutiny. He does not pretend that he did. He says only that they were brought to him by the messenger of the borrower, and that he took them and gave Post's check in exchange. Undoubtedly he recognized the familiar signatures and noted the number of shares represented: but there was nothing like careful scrutiny or examination, but unhesitating trust in the honesty of the borrowers. I cannot say, as matter of law, that such was the full measure of his duty, and that he did not hastily withhold more or less of the very skill and knowledge upon which Isham relied in selecting Post to

loan for him the money. The answer made would be sufficient if it had been proved. That answer is that the forgery was so skillfully and deftly executed that no ordinary skill, exercised upon a reasonable examination, would have disclosed the fraud or even aroused suspicion. But we do not know that. The certificates themselves were before the trial judge, and what inference he drew from their inspection we cannot say. What we do know is that one of them, raised from three to ninety-three, was so skillfully changed that when Shephard and Isham examined it critically, after knowledge of the forgery, the latter thought it genuine. What Shephard thought he did not tell us, and omitted to say that what would have deceived the inexperience of Isham would also have deceived him.

But at this stage of the case the defendant realized the necessity of proof that the forgery was deft enough to deceive the skill and knowledge of any ordinary banker dealing in such securities. As I look at it the point had become vital to the defense. If a fair and reasonable examination of the papers, in the room of a hurried and momentary glance would have disclosed the fraud to the skilled eye of an experienced banker, or awakened a suspicion which would have led to a verification, then I think a finding of negligence would be justified. But if, on the contrary, the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker, knowing the signatures, but not suspecting fraud in the body of the instruments, then scrutiny would have done no good and the deception suffered would be excusable. Just that the defendant sought to prove in two ways. He offered to show, first, that he himself had loaned fifty thousand dollars of his own money to the same borrowers, accepting in part similar raised collateral; and, second, that for several years the same identical raised certificates had been given and received on the street as collateral for loans, and deceived the skill and care of a great number of bankers and brokers, who took and held them without suspicion. Both offers of proof were refused and the evidence excluded. I think that was error. The proof would

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have shown, at least, the character of the forgery, and that Shephard was not in fault for not discovering it. It would have established Post's absolute good faith in the transaction and that he took the same care of Isham's money as of his own. Of course it was not admissible to show merely that some others were no more prudent than Post, or that his own fault was less because they did the same, but it was admissible to prove that Shephard was deceived by a forgery so perfect and skillful that it escaped for years the vigilance of the street. With that fact in the case added to what already appears, I should deem the defense sufficiently established. It was objected to this offered evidence that it might involve an examination of each separate transaction with others. That was not proposed or necessary. The witness testifying was Watson. He had been the clerk of Mills, Robinson & Smith for eleven years and had charge of all their loan business. The offer was to prove by him that for years these raised certificates had been used on the street as collateral for loans without a suspicion on his part, and baffling the skill and knowledge of banks, brokers and business firms of experience and reputation. It seems to me, if that is the truth, that no fact could more conclusively establish the perfection of the forgery and more completely excuse and justify the failure of Shephard to discover it. What was permitted to be proved makes the existence of such a fact quite probable. The certificate raised from three to ninety-three was well enough done to have deceived Isham, and, as to the others, it was much easier to change seven to seventy and eight to eighty without attracting notice. If this occurrence has disclosed a new danger in the business methods of the stock market, it may serve at least as a warning, and tend to make more deliberate inspection and closer scrutiny an ordinary duty.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except BARTLETT, J., not sitting.

Judgment reversed.

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In the Matter of the Cancellation of the Name of **MATILDA JOSLYN GAGE** on Registry List of Election District, etc.

A school commissioner is a constitutional officer "elected by the People," and so, under the State Constitution prescribing the qualification of voters (Art. 2, § 1), may only be voted for by "male citizens."

Accordingly *held*, that the act of 1892 (Chap. 214, Laws of 1892), conferring upon women the right to vote for school commissioners, is unconstitutional. On appeal from order striking the name of a woman from the registry list, *held*, that although the election had passed and so the possibility of the woman's voting was absolutely gone, the question was not purely an abstract one as the order determined her status under the act and settled her rights for future elections, and so the case presented required its determination.

(Argued January 15, 1894; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 21, 1893, which affirmed an order of a justice of the Supreme Court, made at Chambers, striking the name of Matilda Joslyn Gage from the registry list of the third election district of the town of Manlius, Onondaga county.

The facts, so far as material, are set forth in the opinion.

Louis Marshall for appellant. The order appealed from involves a substantial right. (*People v. Sturtevant*, 9 N. Y. 263; *Ashby v. White*, *Ld. Raym.* 938; 1 Smith's L. C. [9th ed.] 464; *Green v. Shumway*, 39 N. Y. 418; *Goetcheus v. Matthewson*, 61 *id.* 420; *Day v. Bach*, 87 *id.* 56; *Bradley v. Fisher*, 13 Wall. 351.) Chapter 214 of the Laws of 1892, permitting women to vote for school commissioners, is constitutional. (Const. N. Y. art. 2, § 1; *Id.* art. 10, § 2; Laws of 1814, chap. 142; Laws of 1856, chap. 179; Laws of 1864, chap. 555; Laws of 1880, chap. 9; Laws of 1888, chap. 381; Laws of 1893, chap. 131; *People ex rel. v. Dayton*, 55 N. Y. 367; *People v. H. Ins. Co.*, 92 *id.* 337; *Town of Southampton v. M. B. O. Co.*, 116 *id.* 16; *Sweet v. City of Syracuse*, 129 *id.* 345, 350; *People ex rel. v. Westchester Co.*, 139 *id.* 524; *Fort v. Burch*, 6 Barb. 73; *Belles v. Burr*, 76 Mich. 1; *Wheeler v. Brady*, 15 Kans. 26; *State v. Conez*, 15 Neb. 444; *Plummer*

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v. *Yost*, 33 N. E. Rep. 191; *People v. N. Y. & M. B. R. R. Co.*, 84 N. Y. 565; *East Oakland v. Skinner*, 94 U. S. 255; *T. Ins. Co. v. Hamilton*, L. R. [12 App. Cas.] 484; *Sturgis v. Spofford*, 45 N. Y. 446; *In re Carboy*, 27 Hun, 82; *Ogden v. Saunders*, 12 Wheat. 270.)

W. P. Goodelle for respondent. Chapter 9 of the Laws of 1880 does not confer eligibility to the office of school commissioner upon females. (8 N. Y. 253; *In re Mayor, etc.*, 99 id. 577; Cooley on Const. Lim. 148.) But if it should be held that the act of 1880 did intend to and does authorize women to hold the office of school commissioner, and that the act of 1892 did intend to and does attempt to confer upon women the right to vote for school commissioner, then the law of 1892 is in contravention of our State Constitution. (Const. N. Y. art. 2, § 1; Id. art. 10, § 2; *People v. Barber*, 48 Hun, 195, 198, 201; *Spencer v. Board of Registration*, 1 McA. 169; *U. S. v. Anthony*, 11 Blatchf. 200; *People v. Pease*, 27 N. Y. 45, 52, 53; *People ex rel. v. English*, 29 N. E. Rep. 678; *Green v. Shumway*, 39 N. Y. 418; Cooley on Const. Lim. 77, 599; Laws of 1864, chap. 555; *People ex rel. v. McKinney*, 52 N. Y. 374; *People v. Draper*, 15 id. 532.)

FINCH, J. The question argued on this appeal is whether a woman may vote for school commissioner in her proper district within the state, and it arose in this manner: An act of the legislature (Laws of 1892, chap. 214) provides that "All persons without regard to sex, who are eligible to the office of school commissioner and have the other qualifications now required by law, shall have the right to vote for school commissioner in the various commissioner districts of the state." The act further requires that the persons so entitled to vote shall be registered "as provided by law for those who vote for county officers;" that the county clerk shall prepare and distribute the prescribed ballots, and the inspectors of election shall receive and count the same. Acting under this authority Mrs. Gage was duly registered in the third election district of the town of Manlius on October 21st, 1893. The board of

inspectors were formally requested to remove her name from the registry, but refused to comply with the demand, whereupon an application was made to a justice of the Supreme Court pursuant to section 37, chapter 680 of the Laws of 1892, to strike her name from the registry, on the sole ground that she was not a lawful voter by reason of her sex. That application was granted, the learned judge holding that the act conferring upon her the right to vote for school commissioner was unconstitutional. The inspectors obeyed the order. Mrs. Gage appealed to the General Term, where it was affirmed, and from that affirmance brings her appeal to this court.

While it is true that the election of 1893 has passed, and the possibility of voting on that occasion is absolutely gone, it does not necessarily follow that the question involved has become purely abstract and divested of any practical results consequent upon its decision. The order made determined the *status* of the voter under the act of 1892, and settled her right for future elections; and if a wrong has been done it is not easy to discover any practical remedy except through a reversal of the order which was granted. Both parties concur in seeking a final decision upon the constitutional question involved, and we are of opinion that the case presented requires of us its determination.

The learned counsel for the appellant states very frankly and accurately the sole inquiry upon which the decision depends. He concedes that under article 2, § 1, and article 10, § 2 of the Constitution, no woman has the right to vote for constitutional officers, because the franchise is conferred explicitly upon "male citizens;" but he contends that school officers are not such constitutional officers, because the practical interpretation of that instrument has long and invariably been to the contrary. That is true and only true of the officers of the school district, as the fundamental unit of the school system. The trustees of such a district are the authorized business managers of the school within its boundaries, and the legislature has always assumed, and been permitted to assume, the right to determine who might vote for such trustees, and

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what qualifications should or should not be requisite and necessary. To that class of school officers intrusted with the government and control of the simple school district, by itself alone and within its own boundaries, the constitutional provisions have never been applied; but I have yet to find an instance in the statutory history of the state prior to the act in question, where an officer whose authority was not confined to the school district, but extended over many of them, with a power of superintendence and control, has been regarded as anything other than a town or county officer and within the constitutional provisions. Under the Revised Statutes the superintending officers were three commissioners and three inspectors of common schools. (1 R. S. p. 340, § 3.) These were town officers, to be chosen by the constitutional electors (§ 1) and by ballot. (Id. 343, § 2.) In 1843 these officers were abolished (Chap. 133, § 1), and in their place was substituted (§ 2) a town superintendent of common schools, to be annually elected in the same manner as "other town officers" are chosen, and upon whom the duties of inspection and superintendence were imposed. He also was a town officer and chosen by the constitutional electors. In 1864 (Chap. 179) the system was again changed by providing first for the appointment and then for the election of school commissioners. The terms of the statute show that they were still regarded as within the constitutional provisions, and were county officers, as their predecessors had been town officers. Where a county constituted a single assembly district the supervisors were to choose "for their county" an officer to be called school commissioner. (§ 1.) Where a county had more than one assembly district a commissioner for each of such assembly districts was to be chosen. (§ 2.) So far the office created pertained to the known constitutional divisions of the state, and its incumbent was clearly a county officer. The situation was not changed by the further provision allowing in a single county constituting but one assembly district the selection of two commissioners, and dividing the county into sections for that purpose. (§ 4.) No town was to be divided in the process, and the commissioner of one sec-

tion could discharge his official duty in the other section upon the written request of its commissioner. (§ 7.) Under the act of 1864 (Chap. 555, title 2, § 11) he is required to do so upon the command of the superintendent of public instruction. Under the law of 1856 the appointment by the boards of supervisors was but temporary. At the annual general election of 1857 the officers became elective, and it was provided that "all the provisions of law relating to the mode of voting and of canvassing the votes for the county officers shall apply to and govern the election of such commissioners." If it be a just criticism that this provision was merely modal, that may have furnished a reason why, for a plainer exposition of the intended meaning, the language was changed in the General Act of 1864. It there reads (§ 3, title 2): "The laws regulating the *election* of, and canvassing the votes for, county officers shall apply to such elections." Who may vote for county officers is an essential part of the laws "regulating" their election, for it has been held that into those laws is to be read the constitutional definition of an elector as if it had been specially repeated therein. (*People v. Barber*, 48 Hun, 198.) It follows that there are two definite and distinct classes of school officers, which are those of the school district, the unit of the system, and those of superintendence over a larger or smaller number of such units aggregated; and that the latter are and always have been as clearly either town or county officers as the former have not been. I am unable to see, therefore, that any practical construction, prior to the act of 1892, has ever been given to the Constitution which takes the elective officers charged with superintendence out of the category of constitutional officers, or puts a constituency behind them having other qualifications than those necessary for the election of town and county officers.

The Constitution, in article second, section one, prescribes the qualifications of voters "for all offices that now are or hereafter may be elective by the people," and confines the franchise specifically to "male citizens." The office of school commissioner was one thereafter made "elective by the

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people" through the operation of the alternative given by article ten, section 2, which provides that "all officers whose offices may hereafter be created by law shall be elected by the people or appointed as the legislature may direct." That is, in such cases it may choose between election and appointment, and in the latter event may dictate the authority and mode of appointment. The legislature chose that the office should be elective, and becoming such, it fell within the scope and terms of the constitutional provisions applicable to elections by the people. The only possible answer is the one which was attempted and derived from a supposed practical construction. We have seen that the facts do not justify that answer. Indeed, the cases cited from other states do not go far enough to support the appellant's argument. In *Belles v. Burr* (76 Mich. 1) the question was over the election of a school district trustee. In *Wheeler v. Brady* (15 Kansas, 26) the controversy concerned a school district treasurer. In *State v. Cones* (15 Neb. 444) the voting was at a school district meeting. In *Plummer v. Fost* (33 N. E. Rep. 191) the election was of members of the board of education. And the opinion of the judges (115 Mass. 603) related to the right of a woman to be a member of a school committee. On the other hand, when the question arose in Kansas, not of voting at a school district meeting, but for a county superintendent of schools, the court deemed it almost too clear for argument that a woman could not vote for the latter officer. (*Winans v. Williams*, 5 Kansas, 227.)

It seems to me needless to prolong the discussion. A constitutional convention may take away the barrier which excludes the claimed right of the appellant, but until that is done we must enforce the law as it stands.

The order should be affirmed, but, as stipulated, without costs.

All concur.

Order affirmed.

THE PEOPLE ex rel. THURBER, WHYLAND COMPANY, Appellant,
v. EDWARD P. BARKER et al., Commissioners of Taxes, etc.,
Respondents.

Foreign corporations are included within the terms of the act of 1855 (Chap. 37, Laws of 1855) subjecting non-residents doing business in this state to assessment and taxation on all sums invested in such business. A person or corporation liable to assessment and taxation under the act is not entitled to a deduction of debts.

(Argued January 15, 1894; decided January 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 13, 1893, which affirmed an order of Special Term dismissing a writ of certiorari to review an assessment by defendants upon the personal property of plaintiff for the year 1890 and ratifying and confirming the same.

The facts, so far as material, are stated in the opinion.

L. C. Waehner for appellant. The relator is organized under the laws of the state of New Jersey, and that state is, therefore, its domicile, and it is a non-resident. (Laws of 1855, chap. 37; *People v. McLean*, 80 N. Y. 259; *B. C. L. Ins. Co. v. Com. of Taxes*, 1 Keyes, 303; *Parker Mills v. Com. of Taxes*, 23 N. Y. 242.) This is the only statute regulating the taxation of foreign corporations for local purposes, and therein alone must be found the power and method of assessing and taxing them. (*People v. McLean*, 80 N. Y. 259; *Parker Mills v. Com. of Taxes*, 23 id. 242.) The basis — and the only basis — for assessment and taxation under the act is on all sums invested in any manner in said business. (*People ex rel. v. Wemple*, 133 N. Y. 323; *People v. McLean*, 80 id. 259; *People ex rel. v. Com. of Taxes*, 23 id. 224.) The same system of assessment and taxation prevails in the cases of foreign corporations, etc., as applies to and regulates the assessment of and taxation of residents. (*In re Swift*, 137 N. Y. 84; *People ex rel. v. Wemple*, 133 id. 325.) The bills.

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receivable and moneys owing to the relator are not "in law" sums invested in its business. (Laws of 1883, chap. 392; *People ex rel. v. Wemple*, 133 N. Y. 328.)

D. J. Dean for respondents. Under the scheme of the statute for the taxation of non-resident persons and corporations no deduction for debts from the amount of capital invested in business of the state of New York is authorized. (*People ex rel. v. Comrs., etc.*, 4 Hun, 596; *Hoyt v. Comr. of Taxes*, 23 N. Y. 224; *Williams v. Bd. Suprs.*, 78 id. 561.) If, however, the relator is entitled to a deduction for its debts, as a resident would be, then the respondents were authorized to include in the capital invested in this state the sums due to it. (1 R. S. 388, 390, §§ 3, 9.)

PECKHAM, J. The relator complains of the amount of its assessment for purposes of taxation because, as is alleged, its indebtedness was not deducted therefrom by defendants. It is a foreign corporation having, according to the affidavit made by its president, a principal office at 76 Montgomery street, Jersey City, New Jersey, in which state it was organized under the laws thereof. Its office in New York city is stated to be at 116 Reade street.

It also appeared by the affidavit that the company was organized with a nominal capital of \$3,000,000, of which \$2,500,000 had been issued, \$100,000 for cash and the rest for property consisting of merchandise, trade marks, good will, etc. On January 11, 1892, it owned merchandise within the state, exclusive of imported goods in original packages, of \$500,000 in amount. It also had accounts and bills receivable owing to it within the State of New York of about \$200,000, cash in bank about \$20,000, and other personal property in the state of about \$50,000, or a total of \$750,000. It owed on the day above named in New York city, open accounts of about \$150,000, and bills payable \$1,068,904.42, or a total indebtedness of \$1,218,904.42. It was further stated in the affidavit that the balance of the capital was employed

outside the city of New York, principally in the form of accounts receivable, amounting to about \$1,400,000. The tax commissioners assessed the personal property of the relator at the sum of \$500,000, after hearing the relator and considering its demands, and they decided that sum to be just and the amount for which the personal estate of the relator was lawfully assessable for the year.

The relator claimed that the indebtedness above set out should be deducted from the sum of \$750,000, which it stated was the utmost amount of its property that could, under any circumstances, be regarded as invested in any manner in business in this state, and that if such deduction were allowed, there was no sum remaining upon which to make any assessment. Objection was made by it to the addition of any part of the above-named sum of \$1,400,000 to the sum of \$750,000, because, as it alleged, the former sum was employed outside the city of New York and was principally in the form of accounts receivable. The claim was that, as to such accounts, they had no *situs* in and of themselves and were mere choses in action, and took in law the *situs* of their owner, and that *situs* was its domicile in New Jersey. It was, therefore, urged that no part of such sum could be regarded as invested in any manner in the business of the relator in the city of New York.

Prior to 1855, great numbers of persons doing business in this state, and having large amounts of moneys invested within its borders, nevertheless chose to reside just outside its confines. Although these persons were non-residents of the state, yet they came daily within its boundaries for the purpose of doing business here, and had here large amounts of capital invested in their business, and yet under our laws they could not be reached for taxation. Their names could not be put upon an assessment roll because they did not reside in any town or ward where an assessment could be made, and they had no agents or trustees who resided in the state against whom any assessment on account of such property could be made. To reach the non-resident for the purpose of subject-

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ing such property to taxation was the object of the act, ch. 37 of the Laws of 1855. (*People ex rel. Hoyt v. Commrs. of Taxes*, 23 N. Y. 224.)

Section one of the act reads as follows :

"All persons and associations doing business in the state of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong."

We are of the opinion that this act does not contemplate the deduction of debts from the sums invested in this state by non-residents. As the person is a non-resident, it is to be assumed that he will, at the place of his domicile, have all of what might be termed his equities adjusted, and that if entitled to it anywhere it will be at such domicile that he will claim and be allowed the right to have such deduction. In his case the statute of 1855 seizes upon the certain, specific sum which he has here invested in the business carried on by him, and that sum is to be assessed and taxed the same as if the person were a resident of the state. In using the expression "the same as if they were residents of this state," we do not think it was intended that exceptions were to be allowed here the same as if the party were a resident, or that deductions from the sum thus invested should be made as if that were the case. It meant, as it seems to us, that the sum invested in any manner in business in this state should be assessed in the same manner and form as a resident would be assessed.

Foreign corporations are included within the terms of the act of 1855. (*Life Ins. Co. v. Commrs. of Taxes*, 1 Keyes, 303, cited in *People ex rel. Bay State, etc., v. McLean*, 80 N. Y. 254 at 259.) Hence it was said that a foreign corporation doing business in New York was properly taxable in the city of New York, where its principal place of business or office of the agency existed. And in this last-cited case in 80th New York, it is said that the act of 1855 points out the mode

of taxation, viz., "the same as if they were residents of this state;" and in referring to the mode of taxing a resident corporation it is found that it is to be taxed in the town or ward where it has a principal office or place for the transaction of its financial concerns. The foreign corporation is not to be taxed in all things the same as if it were a resident, because the statute expressly provides that it is only to be taxed for the sum invested in business in this state, and in order to tax it upon that sum no indebtedness should be allowed. The percentage, the form, the mode of the assessment and taxation upon the specific sum invested in business in this state are to be the same as if the person were a resident, but inasmuch as all the subjects of assessment against a non-resident are not within the jurisdiction of the state, but only the sum here invested, it is plain that it was never contemplated by the legislature that such non-resident should have the right to make deductions from that sum by reason of debts, while the taxing authorities would have no right to balance such deductions by an assessment of other property of the non-resident not situated within the state. The resident has no right to deduct his indebtedness from any specific piece of personal property, or from any special chose in action. In a general way it may be said that he is to be charged with all his personal property, and from that total he may deduct his debts. This cannot be done in the case of a non-resident, although it may (as we may assume) be done at his domicile. All we are to do is to assess and tax the sum here invested, and the equities must, as we have said, be adjusted at the domicile of the person.

The assessment of a domestic corporation is made after a deduction for debts, because its capital and surplus are to be assessed at their actual value, which cannot be arrived at without considering and deducting debts. A foreign corporation is not to be thus taxed, and no inquiry is made as to the actual value of such capital or surplus, and as such value is not to be assessed or taxed, the debts should not be deducted from specific property here invested.

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Statement of case.

The relator having no right to deduct its debts from the sum it had invested in its business here, it is unnecessary to discuss the question whether the amount of the debts due it should be regarded as any part of the sum invested in its business in this state, because the sum assessed by the defendants is less than the amount which the affidavit of the president of the relator shows was invested in its business in this state at the time of such assessment, exclusive of those accounts.

The order of the General Term should, therefore, be affirmed, with costs.

All concur.

Order affirmed.

ALFRED T. WHITE et al., Appellants, v. THE INEBRIATES' HOME FOR KINGS COUNTY, Impleaded, etc., et al., Respondents.

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150	206

141	128
152	408

141	128
155	622

An order denying a temporary injunction in an action wherein there are no controverted facts and the complaint presents simply a question of law, is reviewable here.

The provision of the act "to provide means for the support of the Inebriates' Home for Kings county" (§ 1, chap. 687, Laws of 1872), as amended in 1877 (§ 4, chap. 169, Laws of 1877), which directs the comptroller of the city of Brooklyn to pay to the treasurer of said home fifteen per cent of the excise moneys, was not repealed by the city charter of 1888 (Chap. 583, Laws of 1888).

Said act is not a "local and special" act relating to the corporation of the city, within the meaning of the repealing clause in said charter. (§ 35, tit. 22.)

The facts that said provision of the act of 1872 was amended in 1875 "so as to read as follows," and that in the amendatory act of 1877 the original provision was amended without reference to the amendment of 1875, do not render the last amendment nugatory; the original provision was not so merged and lost in the first amendment as to prevent a further amendment thereof by reference simply to the original.

People v. Wilmerding (136 N. Y. 363), distinguished.

Said amendatory act of 1877 is not violative of the provision of the State Constitution (§ 11, art. 8) forbidding the giving by a city of its money or property in aid of persons or corporations, save as excepted; it comes within the exception allowing such gifts by a city "in aid or support of its poor as may be authorized by law."

(Argued January 15, 1894; decided January 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 5, 1893, which affirmed an order of Special Term denying a motion by plaintiffs for a temporary injunction.

In the General Term it was adjudged, as the ground for the affirmance, that chapter 169, Laws of 1877, was constitutional, has not been repealed and authorizes the comptroller of the city of Brooklyn to pay to defendant, the Inebriates' Home of Kings county, fifteen per cent of the moneys collected after April 1, 1877, for licenses.

The facts, so far as material, are stated in the opinion.

R. Burnham Moffat for appellants. The order is appealable to this court. (*Birge v. B. B. Co.*, 133 N. Y. 477; *Anderson v. Anderson*, 112 id. 104; *T. Co. v. R. R. Co.*, 121 id. 397.) Chapter 169 of the Laws of 1877 was repealed by chapter 583 of the Laws of 1888. (*Ferguson v. Ross*, 126 N. Y. 465; *People ex rel. v. Allen*, 42 id. 417; *Shepherd's Fold v. Mayor, etc.*, 96 id. 137; *People ex rel. v. Ingersoll*, 58 id. 1; *People v. Wilmerding*, 136 id. 368; *Ellis v. Paige*, 1 Pick. 43; *Bartlett v. King*, 12 Mass. 537; *Butler v. Russell*, 3 Cliff. 251; *Patterson v. Tatum*, 3 Sawyer, 164; *In re Southworth*, 5 Hun, 55; *Bowen v. United States*, 14 U. S. Ct. of Cl. 162; Laws of 1886, chap. 626.) Section 4 of chapter 169 of the Laws of 1877 is a nullity and is void. (Laws of 1877, chap. 687, § 1; Laws of 1875, chap. 627, § 3; *People v. Wilmerding*, 136 N. Y. 368.) The provisions of chapter 169 of the Laws of 1877, which direct payment to the Inebriates' Home of fifteen per cent of the Brooklyn city excise moneys, are in violation of article 8, section 11, of the State Constitution. (*People ex rel. v. Brown*, 55 N. Y. 187; *People ex rel. v. Allen*, 42 id. 404; *People ex rel. v. Dayton*, 55 id. 367; *People ex rel. v. Jackson*, 85 id. 544; *People v. Purdy*, 4 Hill, 384; *Gordon v. Cornes*, 47 N. Y. 616; *Hequembourg v. City of Dunkirk*, 49 Hun, 550; *People ex rel. v. Kelly*, 76 N. Y. 475; *In re Mayor, etc.*, 99 id. 589; *People v. Ingersoll*, 58 id. 1; *People v. Field*, Id. 491; *Shepherd's Fold v.*

Mayor, 96 id. 137; *People ex rel. v. City of Rome*, 136 id. 496.)

James C. Church for respondents. It is contended that the various acts incorporating and providing for this institution are all of them general and not local laws. In construing as to whether legislation is to be deemed local or general, the fact that the principal operation of the act is confined simply to one locality of the state does not of itself make the act a local act, but, in order to be local, its operation, effect and purpose must be entirely confined to the property and persons of a specific locality. (*People v. O'Brien*, 38 N. Y. 184; *Healy v. Dudley*, 5 Lans. 120; *Ferguson v. Ross*, 126 N. Y. 459; *People v. Stevens*, 2 Abb. Pr. [N. S.] 351; *People v. Bd. Suprs.*, 43 N. Y. 21; *People v. N. P. R. Co.*, 86 id. 7.) Assuming that the various acts under consideration are local acts, they are not repealed by the provisions of the charter of the city of Brooklyn. (*People ex rel. v. Bell*, 125 N. Y. 722.) This act does not interfere with the provision of the Constitution in relation to the payment of money by any city. (*Shepherd's Fold v. Mayor, etc.*, 96 N. Y. 137.) Should it be held that the act of 1887 was a local one it does not interfere with the constitutional prohibition. (*People v. Briggs*, 50 N. Y. 558; *Brewster v. City of Syracuse*, 19 id. 117.)

GRAY, J. This is an action by taxpayers to restrain officials of the city of Brooklyn from paying certain moneys to the Inebriates' Home for Kings county. An application for a restraining order was denied *pendente lite*, and that order was affirmed by the General Term. An appeal was taken from the order of affirmance to this court. There are no controverted facts, and the complaint presented but a question of law, which was, in fact, determined adversely by the denial of the motion for an injunction. The form of the order below, by adjudging upon that question, and disposing of the issues, raises a question of law, which we can review here. (*Birge v. Berlin Bridge Company*, 133 N. Y. 477.)

The "Home" was incorporated under chapter 843, Laws of 1867, for the purpose of receiving inebriates, entering voluntarily or by order of the trustees. Its objects were declared to be reformatory, and its operation and powers comprehended the county of Kings. This act, and subsequent amendatory acts, provided for the raising of revenues by appropriating a certain proportion of the excise moneys of Kings county and of the city of Brooklyn.

By section IV of chapter 169 of the Laws of 1877, it was finally provided that the city comptroller shall pay to the treasurer of the "Home" fifteen per cent of the moneys received for licenses granted and that the board of excise commissioners of the towns of Kings county shall also pay to the treasurer fifteen per cent of the moneys received for licenses granted by them. It is claimed that that act was repealed by chapter 583 of the Laws of 1888, commonly known as the city charter. That act provided, in section 35 of title XXII, for the repeal of "All local and special acts, passed prior to June 1, 1888, relating to the corporation of the city of Brooklyn, or to the administration of the property and affairs of said corporation." We think that the act of 1877 in question can only be said to be in a sense, and relatively to the rest of the state, local. The title was "An act to provide means for the support of inebriates for Kings county," etc., etc., and the scope of its action was over the whole county. It would be a misuse of terms to classify it with the local and special acts to be affected by the repealing clause of the city charter. Relatively to the county the act was general in its objects and provisions. Incidentally it touched the local administration of the city of Brooklyn. In the revision and combination of existing special and local laws affecting the city, which chapter 583 was designed to effect, it is but reasonable to suppose that the acts intended to be combined were such as directly, and only, concerned the municipal administration. We should not extend its operation of exclusion or repeal to acts, which affect the city only as it is part of a subdivision of the state; unless compelled to do

so by express language. It is further insisted that section IV of the act of 1877, referred to, is a nullity. That result is reached by the appellants by comparing the provision of a prior act amendatory of the original act. In 1872 an act was passed (Laws, chap. 687), which, in its first section, provided with respect to the appropriation of certain percentages of city and county excise moneys. In 1875 (Laws, chap. 627, § 3) section one of the act of 1872 was amended "so as to read as follows," etc.; and by the use of that language and because of the amendment containing all the provisions of the amended section with other new ones, it is, in substance, claimed that section I of the act of 1872 was so merged and lost in the amending section as to be incapable of the reference and amendment contained in the act of 1877. In support of this the case of *People v. Wilmerding* (136 N. Y. 363) is relied upon. But that case is no authority for any such proposition. There the question was as to the effect of the repeal of a statute, which had incorporated by amendment an earlier enactment, upon that earlier enactment, and it was held that it also was repealed. The principle of the decision, upon that point, was that the repeal of the amending act did not operate to revive the earlier or original act. But here there was no case of repeal. The act of 1877 simply further amended a legislative provision for raising revenues for the "Home," contained in the act of 1872. That the provision was amended by the act of 1875, so as to read as in that act stated, did not prevent a further amendment of the original statute by the legislature in 1877, so that the section, in course of amendment, should read as prescribed in the changed form. There is good reason for holding, as we did in the *Wilmerding* case, against an indirect revival of a statute once repealed, by a repeal of the repealing act; but none for holding that an enactment, however amended in its provisions and however incorporated in the amendments, may not be further amended by reference to the statute, in which it originally appeared.

The only remaining point to be noticed is that the provisions

of chapter 169 of the Laws of 1877, respecting the payment of the excise moneys by the city, violate section XI of art. VIII of the Constitution of the state. That section forbids the giving by a city of moneys or property in aid of persons, associations, or corporations; but makes an exception in the case of "aid or support of its poor as may be authorized by law." We think the objects of this legislative enactment do comprehend an aid and a support of a very necessitous and helpless class of the poor of the city. In the performance of its charitable and reformatory duties, the trustees of this corporation are empowered to receive and care for drunkards in the jails or penitentiaries. Thereby the community is relieved of the burden of caring for them, *pro tanto*. The case of *Shepherd's Fold v. Mayor of New York* (96 N. Y. 137) is sufficient authority upon the point. There the corporate objects were to receive, support and educate orphan, or friendless, children. That decision asserted the obligation of localities to provide for their poor, and held that the constitutional inhibition did not prevent carrying out designated charities through the instrumentality of private corporations; but the giving away of the moneys of the state, or of its counties, or local divisions; except for the designated purposes for which each is authorized to provide. That this act comprehends a provision for the poor of the city and of the county is evident. In terms, the 4th section of the act of 1877 provides that the excise moneys "shall be paid to the treasurer upon the presentation of a * * * resolution * * * declaring that it is necessary for the care and maintenance of the indigent poor treated therein," etc. We can see no violation of the Constitution; but, rather, an effectuation of a municipal duty to aid the poor through a duly authorized instrumentality.

For the reasons given, we think the order below was right and should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLOTTE EWER, Appellant.

In the Matter of the Petition of CHARLOTTE EWER for Writs
of Habeas Corpus and Certiorari, etc.

While it is the inalienable right of a child, even of immature age, to pursue a trade, it must be not only one that is lawful, but which the state or sovereign, as *parens patriæ*, recognizes as proper and safe.

The provision of the Penal Code (§ 292) declaring a person guilty of a misdemeanor who exhibits a female child under fourteen years of age, or who, having the care of such a child as parent, etc., consents to her employment or exhibition as "a dancer * * * or in a theatrical exhibition, or in any * * * exhibition dangerous or injurious to the life, limb, health or morals of the child," is not limited to exhibitions which offend against public morals or decency, or endanger life or limb, but applies to all public exhibitions or shows.

Said provision is not violative of any right secured by the Constitution, but is within the police power of the legislature; it is for that body to determine as to whether any or all such exhibitions are prejudicial to the interests of the child and contrary to the policy of the state to permit. Reported below, 70 Hun, 239.

(Argued January 16, 1894; decided January 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made July 3, 1893, which affirmed an order of Special Term overruling demurrers of the relator to returns to writs of habeas corpus and certiorari, dismissing said writs and remanding her to custody.

Charlotte Ewer was arrested, upon a police magistrate's warrant, charged with a misdemeanor, in violating section 292 of the Penal Code, by exhibiting her child, Mildred Ewer, as a dancer at the Broadway Theatre in New York city. The examination before the magistrate sustained the charge and showed that she was of the age of seven years and went by the stage name of "La Regalancita"; that she was clad in the usual style of the ballet dancer, in a low-necked, sleeveless and short dress and wore purple tights; that she danced upon the stage to the music of an orchestra, elevating her legs, moving upon her toes, and posturing with her figure.

141	129
144	536
141	129
149	201
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153	461
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j157	147
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j164	111

Her mother, being held upon the charge, sued out writs of habeas corpus and certiorari; to which the magistrate made return of his proceedings etc. The prisoner demurred to the return; alleging that there were no sufficient grounds for holding her and that the statute, under which she was arrested, was unconstitutional.

The provisions of the Code under which this arrest was made, read that "a person who * * * exhibits * * * a female child apparently or actually under the age of sixteen years, * * * or who, having the care etc. of such a child as parent etc. * * * in any way consents to the employment or exhibition of such a child either as * * * a dancer * * * or in a theatrical exhibition * * * or in any * * * exhibition dangerous or injurious to the life, limb, health or morals of the child * * * is guilty of a misdemeanor." At the Special Term, the writs were dismissed and the prisoner was remanded. The order of that court was affirmed at the General Term and the defendant has appealed to this court.

A. J. Dittenhoefer for appellant. The portions of section 292 of the Penal Code under which the appellant was held are void for the reason that they deprive a person of his natural and inalienable rights. (Penal Code, § 291; Laws of 1882, chap. 410, §§ 1594, 1632; *Ramsey v. Ramsey*, 23 N. E. Rep. 69; *De Manville v. De Manville*, 10 Ves. 52; *In re Finn*, 3 De G. & S. 457; *People v. Turner*, 55 Ill. 280; *People v. Mead*, 24 Abb. [N. C.] 357; *U. S. v. Reese*, 92 U. S. 124; *United States v. Harris*, 106 id. 629-641; *Baldwin v. Franks*, 120 id. 678-685.) The act is not a valid exercise of the police power of the state. (*People v. Rosenberg*, 138 N. Y. 410; *In re Jacobs*, 98 id. 98; *People v. Gilson*, 109 id. 389.) The statute is a violation of the right to liberty secured by the Constitution to all persons, including children. (2 Kent's Comm. 1-8; *People v. Gilson*, 109 N. Y. 389, 400; *Bertholf v. O'Reilly*, 74 id. 575; *L. S., etc., Assn. v. C. C., etc., Co.*, 1 Abb. [U. S.] 398; *Slaughter House Cases*, 16

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Wall. 116; *People v. Marx*, 99 N. Y. 377; *Ex parte McGuire*, 57 Cal. 604.)

Elbridge T. Gerry for respondent. The power of the legislature to regulate the relations between parent and child has never before been questioned. (Maine's Ancient Law, 160; *Bertie v. Lord Falkland*, 2 Vern. 342; *Fraser's Parent and Child* [2d ed.], 67; *Laws of 1874*, chap. 421; *Laws of 1892*, chap. 673; *People v. Cowley*, 21 Hun, 415; 83 N. Y. 464.) The state has a right to restrict the parent in public exhibitions of the child. (*People v. Meade*, 24 Abb. [N. C.] 357; *Sch. Dom. Rel.* [3d ed.] § 265; *Field's Law of Infants*, § 48; *Edwards v. Davis*, 16 Johns. 281; *Penal Code*, § 292.) A similar exercise of its police power has been upheld in numerous cases. (*People v. West*, 106 N. Y. 293; *People v. Kibler*, Id. 323; *Hart v. People*, 26 Hun, 396; *Village of Carthage v. Frederick*, 122 N. Y. 268; *People v. D'Oench*, 111 id. 359; *Bertholf v. O'Reilly*, 74 id. 509; *Phelps v. Racey*, 60 id. 10; *People v. Gallagher*, 93 id. 438; *People v. King*, 110 id. 418.) As to theatres. (*People v. Budd*, 117 id. 1; *Lawton v. Steele*, 119 id. 226; *People v. Arensberg*, 105 id. 123; *People v. Rosenberg*, 138 id. 410; *People v. Gilson*, 109 id. 389; *People v. Marx*, 99 id. 377; *In re Forbes*, 4 Park. Cr. 611; *Duffy v. People*, 1 Hill, 355; 6 id. 75; *In re Donohue*, 1 Abb. [N. C.] 1.)

GRAY, J. The question we shall determine upon this appeal is, whether the statute, under which the appellant was arrested, violates any just and personal rights secured to her by the Constitution of the state. If it is such an interference with the legal relation of parent and child as exceeds the limits within which the legislature, exercising the sovereign power of the state, may regulate and control that relation, then it is the duty of the courts to declare its unconstitutionality. But if it is within a proper and legitimate exercise of legislative functions, the courts may not interfere. This question falls within those which are classified under the head of the police power of the state. The extent of the exercise of that power, with which the legislature is invested and which it has so

freely exerted in many directions, within constitutional limits, is a matter resting in discretion; to be guided by the wisdom of the People's representatives. It is difficult, if not impossible, to define the police power of a state; or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the state, in the interest and for the welfare of its citizens. We may say of it that when its operation is in the direction of so regulating a use of private property, or of so restraining personal action, as manifestly to secure, or to tend to the comfort, prosperity, or protection of the community, no constitutional guaranty is violated, and the legislative authority is not transcended. But the legislation must have some relation to these ends; for, to quote the expressions of Mr. Justice FIELD in the *Slaughter House Cases* (16 Wallace, 36), "under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded." In *People v. King* (110 N. Y. 418), it was well observed by Judge ANDREWS; "by means of this power, the legislature exercises a supervision over matters affecting the common weal. * * * It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community and the propriety of its exercise, within constitutional limits, is purely a matter of legislative discretion, with which courts cannot interfere." The assumption of the exercise of this extraordinary and very necessary power has been the subject of severe criticism in the opinions of judges, when it has been sought thereby to regulate and control in the interest of the public the conduct of corporate or individual business transactions. *Munn v. State of Illinois* (94 U. S. 113) may be referred to as starting a current of authority in this country. But no such criticism can find just grounds for caviling at legislation, whose ends clearly tend to promote the health or moral well-being of the members of society. To that class of legislation this statute belongs. By preventing the exhibition of children of tender and immature age upon the theatrical, or other public, stage, the legislature is exercising that

right of supervision and control over the child, which, in every civilized state, inheres in the government, and which nothing in the legal relations of parent and child should be deemed to forbid. The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child and, as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for and that the duties of support and education be performed by the parent, or guardian; in order that the child shall become a healthful and useful member of the community. It has been well remarked that the better organized and trained the race, the better it is prepared for holding its own. Hence it is, that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop, to prevent injury from excessive labor. It is not, and cannot be disputed that the interest which the state has in the physical, moral and intellectual well-being of its members, warrants the implication, and the exercise, of every just power, which will result in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part.

In the brief of the able counsel, who appears for the People, and whose earnest efforts in behalf of the cause of humanity and of mercy have so distinguished him, the discussion of the subject upon these lines is quite full and interesting. Indeed the learned counsel for the appellant does not, in the main, contest the right and the duty of the state to protect and to promote by adequate legislation the health and morals of its citizens; but bases his arguments here upon the proposition, substantially, that the legislature cannot take from parents the right to employ their children in any lawful occupation, not indecent or immoral; or dangerous to life, limb, health or morals. That proposition may be readily conceded. It is

true enough that if the court could say that this legislation was an arbitrary exercise of the legislative power, depriving the parent of a right to a legitimate use of his child's services; that, while ostensibly for the promotion of the well-being of children, in reality, it strikes at an inalienable right, or at the personal liberty of the citizen and but remotely concerned the interests of the community, it would be its duty to so pronounce and to declare its invalidity. But this legislation has no such destructive effect or tendency. It does not deprive the parent of the child's custody, nor does it abridge any just rights. It interferes to prevent the public exhibition of children, under a certain age, in spectacles, or performances; which, by reason of the place or hour, of the nature of the acts demanded of the child performer and of the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental, or moral well-being of the child, and, hence, to the interests of the state itself. Take the facts of this case and they seem sufficiently to warrant the interference of the law. It is not necessary to reason upon them. The scanty dress of the ballet dancer, the pirouetting and the various other described movements with the limbs and the vocal efforts cannot be said to be without possible prejudice to the physical condition of the child; while in the glare of the footlights, the tinsel surroundings, and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence, as to unfit it for the stern realities and exactions of later life. The statute is not to be construed as applying only when the exhibition offends against morals, or decency; or endangers life or limb by what is required of the child-actor. Its application is to all public exhibitions or shows. That any and all such shall be deemed prejudicial to the interests of the child, and contrary to the policy of the state to permit, was for the legislature to consider and to say.

The right to personal liberty is not infringed upon, because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less excep-

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tionally endowed. The inalienable right of the child, or adult, to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the state, or sovereign, as *parens patriæ*, recognizes as proper and safe. It is not the strict moralist's view, dictated by prejudice, but the view from the standpoint of a member of the body politic, which ranges the judgment in support of legislative interference to restrain the parent from permitting an employment of the child, under circumstances deemed unsuited to its proper mental, moral, or physical development. In the judgment of the legislature, it was deemed as unsuitable for the youth of the community, under a certain age, to dance or to perform in public exhibitions, in the ways mentioned; as it was deemed unsuitable for them to work in the factory, except under certain limitations as to age, hours, etc.

We have not overlooked certain cases, referred to by the appellant's counsel, to show the invalidity of this legislation as an exercise of the police power of the state; or to show a violation of constitutional rights. They establish that the legislature has no right, under the guise of protecting health, or morals, to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation. Such were the *Matter of Jacobs* (98 N. Y. 98); *People v. Marx* (99 id. 377); *People v. Gillson* (109 id. 389); *People v. Rosenberg* (138 id. 410).

We are referred to some cases in Illinois; but they are neither applicable nor authoritative upon the question before us.

Further discussion is unnecessary. We might have remained satisfied with the able and clear exposition of his views by the learned justice at the Special Term, had not the range taken by the arguments of counsel seemed to call for a brief expression by us of our view of the principle of state interference.

The order should be affirmed.

All concur.

Order affirmed.

SUSAN B. YERKES, Appellant, v. CHARLES McFADDEN, Sr.,
et al., Respondents.

In an action against joint debtors, service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action.

So, an attachment issued in an action against several upon a joint liability, may be executed by seizure of the joint property, although the summons is served on but one of the defendants within the time prescribed, and no service by publication is commenced within that time, or if commenced is not continued to completion.

Accordingly *held*, where an attachment was issued against the members of a firm as non-residents, under which the firm property was levied upon, and a service of summons by publication was commenced, but was not completed, in one of the designated newspapers within the thirty days, but personal service was made on one of the defendants, that the lien of the attachment was not lost by the failure to complete the service by publication, nor could the attachment be vacated as against any of the defendants.

(Submitted January 15, 1894; decided January 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made December 9, 1892, which reversed an order of Special Term denying a motion by defendants to vacate an attachment.

This action was brought against defendants, who were non-residents, as co-partners, to recover rent due, etc., under a lease.

On August 1, 1892, an order was obtained for service of the summons by publication, and on August 15, 1892, a warrant of attachment was procured and a levy made thereunder upon partnership property. The publication of the summons was commenced during the first week in August in two newspapers, and, as directed by the order, continued for six weeks in one of them, but in the other, by mistake of the printer, was discontinued after a publication for five weeks, but after an interval of two weeks, upon discovery of the mistake, it was renewed and directed to be continued for six weeks. On August 26, 1892, the summons was personally served upon

one of the defendants, but no personal service was made on the other two.

John M. Roe for appellant. In this case publication had been commenced and was made complete by a continuance thereof, until the full six successive weeks were complete in each paper. (Code Civ. Pro. § 638.) If the service of the summons has been commenced by publication before the attachment has been granted, the requirements of the statute as to service have been sufficiently complied with. (1 Rumsey's Pr. 516; *Baron v. Biaren*, 3 Law Bull. 49; Code Civ. Pro. § 638.) The fact that an attachment has been vacated does not affect the validity of an order of publication of the summons subsequently obtained or entitle the defendant to have it vacated, but the plaintiff will be obliged to sue out another attachment and make a levy before he can take judgment. (*Putman v. Griffin*, 19 Wkly. Dig. 46.) Service by publication having been commenced it must be made complete by a continuance thereof, and such service and continuance are then governed by sections 440 and 441 of the Code. (Code Civ. Pro. § 638.) The statute does not require publication in both papers to be made at the same time. (*M. A. Bank v. P. N. Bank*, 89 N. Y. 387; *Steinle v. Ball*, 12 Abb. [N. S.] 171.) The court must disregard errors that do not affect the substantial rights of the parties. (Code Civ. Pro. § 723.) The object of the publication is to give notice by means of the newspapers and to bring the defendant into court, and the language of the Code (§ 638), that if publication has been or is thereafter commenced the service must be made complete by the continuance thereof, means simply that when the service relied upon as the ground of jurisdiction is publication, it must be not partial and merely commenced but continued and entirely complete. (*M. N. Bank v. P. N. Bank*, 89 N. Y. 400; *Steinle v. Ball*, 12 Abb. [N. S.] 179; *Tuller v. Beck*, 108 N. Y. 355.)

O. P. Hurd for respondent. The plaintiff has failed to comply with section 638 of the Code. (*Dunell v. Williams*,

21 Hun, 216; *Bogart v. Sweezy*, 26 id. 463; *Coursitt v. Winchel*, 39 Hun, 439; *Taddiken v. Cantrell*, 1 id. 710; *Waffle v. Goble*, 53 Barb. 517; *Simpson v. Burch*, 4 Hun, 315; *Taylor v. Troncoso*, 75 N. Y. 590; *Betzman v. Brooks*, 31 Hun, 271.) A new order for publication of the summons should have been obtained when the second attachment was granted. (Code Civ. Pro. § 638.) Where the publication of the summons is once commenced the service must be made complete by the continuance thereof. (*Fuller v. Beck*, 108 N. Y. 355; 89 id. 397.) Personal service of the summons on Charles McFadden, Jr., would not continue the lien of the attachment on the firm property if there was a failure to serve on the other defendants as provided by section 638 of the Code. (*Donnell v. Williams*, 21 Hun, 216.)

ANDREWS, Ch. J. We think the General Term erred in vacating the attachment as to the two appellants in that court, although publication was not commenced against them within the prescribed period. The action was upon a joint liability of the three defendants. Personal service was made on the third defendant Aug. 26, 1892, thirteen days after the warrant of attachment was granted, and the attachment was levied on the joint property of the firm. In an action against joint debtors service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served, and do not appear in the action. (Code, §§ 1932 to 1935 inclusive; *Sternberger v. Bernheimer*, 121 N. Y. 194.) The same rule applies in case of an attachment. Where an attachment issues against the property of several defendants in an action on a joint liability, it may be executed by a seizure of the joint property, and although the summons is served on but one of the defendants within the time prescribed, and no service is made or publication commenced against the other defendants, the attachment cannot be vacated as to them for that reason. The attachment and the lien continues, and if the plaintiff obtains judgment on the joint liability, the joint property seized on

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the attachment may be sold on the execution. The right to seize the joint property on an attachment in an action against joint debtors, although the summons is served on one only, is the same as in case of an execution on a joint judgment under similar circumstances. (*Smith v. Orser*, 42 N. Y. 132.) The case of *Staats v. Bristow* (73 N. Y. 264), has no bearing upon this question. There, in an action brought for a co-partnership debt an attachment was issued against the property of one of the co-partners only, on the ground that he was a non-resident, on which his interest in the co-partnership property was levied upon. The co-partnership at the time was insolvent. After the seizure on the attachment the firm made a general assignment for the benefit of creditors, and subsequently, on obtaining judgment in the attachment action, the interest of the attachment debtor in the firm property was sold on execution. An action was brought to determine the respective rights of the purchaser on the execution sale, and of the assignee for creditors in the property, and it was held that the plaintiff acquired nothing by his levy and sale, because the interest of the attachment debtor in the property was nothing, as the firm was insolvent, and that the assignee acquired title to the *corpus* of the property under the assignment.

In this case the attachment was against the joint property, and if good as against one of the defendants, was good against all. The lien was not lost, nor could the attachment be vacated as against any of the defendants, there having been a valid service of the summons within the time prescribed by sec. 638 of the Code, upon one of the defendants.

The order of the General Term should be reversed and the order of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

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MARY ANN HAWVER, Respondent, v. EDMUND R. BELL et al.,
as Executors, etc., Appellants.

In an action for the conversion of certain machinery which had been used by plaintiff for several years before the alleged conversion, plaintiff was permitted to prove, under objection and exception, what the machinery cost when new. *Held*, no error, that the testimony was some evidence of value.

Counsel for defendants requested the court to charge that the purchase price was not the true rule of damages or the value of the property; to this the court assented, adding "it is only some evidence as to its value as a new and perfect machine. No motion was made for a nonsuit, or exception taken presenting the question that there was no sufficient evidence of value to sustain a verdict. *Held*, that the question could not be raised upon appeal.

(Argued January 17, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 2, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

The action was originally brought against Calvin H. Bell; he having died during its pendency, the executors of his will were substituted as defendants.

The nature of the action and the facts, so far as material, are stated in the opinion.

John T. Shaw for appellant. There is no evidence of the value of the property in the case upon which the verdict can be sustained. (*Hoffman v. Conner*, 76 N. Y. 121, 124; *Beech v. R. & D. B. R. R. Co.*, 37 id. 470; *Roe v. Hanson*, 5 Lans. 304; *People ex rel. v. McCarthy*, 102 N. Y. 638.) If the plaintiff was entitled to recover, she was only entitled to recover the market value of the property taken, at the time of the conversion, with interest, and not the market value at any time subsequently thereto down to the trial, with interest from the 27th day of June, 1888, when the

property was taken. (*Tyng v. C. W. Co.*, 58 N. Y. 308; *Baker v. Drake*, 43 id. 211; *M. & T. Bank v. F. & M. N. Bank*, 60 id. 40, 52; *Whele v. Haviland*, 69 id. 448; *Prince v. Connor*, Id. 608; *Ormsby v. V. C. M. Co.*, 56 id. 623; *Whelan v. Lynch*, 60 id. 469, 473.) The court erred in allowing the witness, Mary Hawver, under defendants' objection, to testify that she was informed that Mr. Bell took or directed the property to be taken away. (*Tabor v. Van Tassel*, 86 N. Y. 672.) The court erred in allowing Henry Hawver, as a witness in behalf of plaintiff, to testify that Archibald sold her it (the engine) for \$700. (*Connoss v. Meir*, 2 E. D. Smith, 314; *Erbien v. Lorillard*, 19 N. Y. 299; *Anderson v. R., W. & O. R. R. Co.*, 54 id. 334; *Nash v. Leeland*, 4 N. Y. S. R. 135; *Tabor v. Van Tassel*, 86 N. Y. 642; *Greene v. H. R. R. Co.*, 32 Barb. 25; *Worrell v. Parmelee*, 1 N. Y. 521; *Osgood v. M. Co.*, 3 Cow. 621; *Newman v. Goddard*, 3 Hun, 70.) The jury must have been and was misled by the charge. (*Morton v. Thurber*, 85 N. Y. 550.) Usury must be proved as alleged. (*L. I. Bank v. Boynton*, 105 N. Y. 656; *Baldwin v. Doying*, 114 id. 452; *Connoss v. Meir*, 2 E. D. Smith, 314; *Whitmark v. Lorton*, 29 N. Y. S. R. 322.) The court erred in denying the defendants' motion made upon the minutes of the court for a new trial. (Code Civ. Pro. § 999.)

T. F. Bush for respondent. In order to justify the seizure before default, it must appear that the mortgagee, in good faith, deemed himself insecure. (*Huggans v. Fryer*, 1 Lans. 281; *Hall v. Simpson*, 35 N. Y. 274-277; *Hathaway v. Brayman*, 42 id. 322, 325; *Allen v. Vose*, 34 Hun, 63.) The evidence clearly shows that the mortgage was usurious and void in its inception. The questions of fact cannot be reviewed in this court. (Code Civ. Pro. § 1337; *In re Reems*, 87 N. Y. 514; *Ilyres v. McDermott*, 91 id. 451; *Tyng v. C. W. Co.*, 58 id. 308; *Price v. L. Bank*, 33 id. 55; *Eastman v. Shaw*, 65 id. 522; *Fiedler v. Darrin*, 50 id. 437; *Thurston v. Cornell*, 38 id. 281; *Swartwout v. Payne*, 19 Johns. 294; *Merrills v. Law*, 9 Cow. 65; 6 Wend. 268, 279; *Sheldon v.*

Haxton, 91 N. Y. 124.) There being no established or market value for that kind of property in question, the opinion of witnesses could not be given, and when given was not conclusive. (*Morehouse v. Matthews*, 2 N. Y. 514.)

EARL, J. The present defendants have been substituted in the place of their testator, against whom the action was originally commenced.

The action was brought to recover the value of certain personal property taken and sold by the testator, among which was an engine, thresher and cleaner. The testator took and sold the property, claiming the right to do so by virtue of a chattel mortgage. The plaintiff claimed that there had been no default in the mortgage, and that the note to secure which it was given was usurious and void. Upon the question of usury there was conflicting evidence. The testator claimed the right to seize and sell the property under what is called the safety clause in the mortgage, and there was conflicting evidence as to his right to proceed under that clause. The verdict of the jury in favor of the plaintiff settles the matters thus depending upon conflicting evidence.

It appeared upon the trial that the engine, thresher and cleaner had been in the ownership and use of the plaintiff for several years before the seizure and sale by the testator, and that they had become considerably deteriorated by age and use. The plaintiff was permitted to prove, against the objection of the defendants, what these articles cost when new, and they now claim that such evidence was improperly received. The trial judge upon the trial, and in his charge to the jury, did not misapprehend the true rule of damages, and that is that the plaintiff was entitled to recover, if she proved her cause of action, the value of the property at the time of its conversion, with interest. The evidence was objected to "as not establishing a proper rule of damages." The judge overruled the objection, saying that "it was some evidence of value," and he did not at any stage of the trial rule that it furnished the measure or rule of damages. That the price

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paid for these articles when new furnished some evidence of their value at the time of their conversion, their age and condition being described, cannot be doubted.

The defendants are not now in a position to claim that there was not sufficient evidence of value to sustain the verdict, or that the damages awarded are excessive, because there are no exceptions presenting these matters for our consideration as questions of law. There was no motion to nonsuit the plaintiff. The true rule of damages was laid down in the charge of the judge. The counsel for the defendants requested the judge to charge the jury "that the purchase price of the engine and thresher is not the true rule of damages or the value of it," and he responded: "No, it is not, because there is evidence that it has been deteriorated in value. It is only some evidence upon its value as a new and perfect machine." There was no error here and the law was correctly stated. To enable the defendants to get the benefit of the point their counsel now urges, they should, upon the trial, have moved for a nonsuit upon the ground that there was not adequate evidence of damages, or they should have raised the question by requesting the judge to charge the jury that the evidence of the purchase price was not sufficient, standing alone, to show the value of the property at the time of its conversion, or they should have made some other request which presented the point to the mind of the judge.

We have considered the other exceptions to which our attention has been called, and they are so clearly unfounded that they need no further attention now.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

**MARGARET KAIN, as Administratrix, etc., Appellant, v.
PATRICK LARKIN et al., Respondents.**

A demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, cannot be sustained unless it appears that, admitting all the facts alleged, no cause of action whatever is stated. The pleading as against the demurrer will be deemed to allege whatever may be implied from its statements by fair and reasonable intendment, and the demurrer will not be sustained by simply showing that the facts are imperfectly or informally averred; that the complaint lacks definiteness and precision, or that material facts are argumentatively stated.

Plaintiff's complaint alleged in substance the recovery of judgment by her against one of the defendants and the return of an execution unsatisfied; that after the cause of action accrued, said defendant transferred his property which would be subject to the lien of an execution to his wife, daughter and brother, by instruments set forth; that said transfers were made without consideration and with intent to hinder, delay and defraud the plaintiff. The relief asked was the setting aside of the transfers and the application of the property to the payment of plaintiff's judgment. At the opening of the case on trial, upon defendants' motion, the court dismissed the complaint on the ground that it did not state sufficient facts to constitute a cause of action. *Held*, error; that it was sufficiently favorable to defendants to consider the question as if presented by general demurrer to the complaint, and so considered the complaint set forth facts sufficient to constitute a cause of action.

Kain v. Larkin (66 Hun, 209), reversed.

(Argued January 18, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial and also affirmed an order denying a motion for a new trial.

This was a judgment creditor's action brought by plaintiff, as administratrix of David Kain, deceased, to have adjudged and declared fraudulent and void as to her intestate, a transfer of certain real estate made by the defendant, Patrick Larkin, to his daughter, Mary E. Larkin, an infant.

The material facts are stated in the opinion.

G. R. Adams for appellant. The sufficiency of a pleading cannot be raised for the first time in the Court of Appeals. It cannot consider a matter or subject that has not been presented by adjudication to, and determined by, the subordinate court. It has no power to review errors not pointed out by exceptions taken at a proper time. (Code Civ. Pro. §§ 996, 1337; *Hofheimer v. Campbell*, 59 N. Y. 269, 271, 272; *Delaney v. Brett*, 51 id. 78, 82; *S. O. Co. v. A. Ins. Co.*, 79 id. 506; *Knapp v. Simon*, 96 id. 291, 292; *Duryea v. Vosburgh*, 121 id. 57.) Under the liberal construction required to be given to a pleading by the Code of Civil Procedure (§ 519), the complaint sufficiently alleges that Patrick Larkin transferred, after the commencement of plaintiff's suit on her lawful demand, the entire property, real and personal, of which he was the owner. (*Zabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 id. 23, 28; *Sanders v. Soutter*, 126 id. 196; *Hale v. O. N. Bank*, 49 id. 626; *People v. Rider*, 12 id. 433; *Seeley v. Engell*, 13 id. 548.) The cause of action set forth in the complaint is statutory, and the facts essential to the cause of action are alleged in the language of the statute. (Code Civ. Pro. § 1871; *Cole v. Jessup*, 10 N. Y. 103, 104; *Ford v. Babcock*, 2 Sandf. 518; *R. R. Co. v. Robinson*, 133 N. Y. 242; *Knapp v. City of Brooklyn*, 97 id. 523; *Nicholson v. Leavitt*, 6 id. 517; *Burdick v. Post*, 12 Barb. 183; *McKiblin v. Martin*, 64 Penn. St. 386.) The acts of the legislature upon the same subject are to be construed and taken together to ascertain the legislative intent as to the effect of a conveyance of property, made with the intent to defraud a creditor or other person. (1 Kent's Comm. 463; Sedgwick on Stat. & Const. Law, 247; *Beebe v. Eastbrook*, 79 N. Y. 253; *Smith v. People*, 47 id. 339; Code Civ. Pro. § 549; *Hoyt v. Godfrey*, 88 N. Y. 669.) A conveyance of real estate made by the parties thereto, with the intent to defraud creditors or other persons, is prohibited by statute, and for that reason the conveyance is void. (Penal Code, § 586; *Wheeler v. Russell*, 17 Mass. 258; *Hallett v. Novion*, 14 Johns. 272, 290; *Hastings v. Farmer*, 4 N. Y.

298; *Burton v. P. J. P. R. Co.*, 17 Barb. 397, 404; *Swords v. Owen*, 43 How. Pr. 176; *S. C. Bank v. King*, 47 N. Y. 87; *Nellis v. Clark*, 20 Wend. 24; *Sweet v. Tinslar*, 52 Barb. 271; *Stewart v. Ackley*, Id. 283; *Mosley v. Mosley*, 15 N. Y. 335, 336.) The courts in this state have always held, and long settled the construction of the Revised Statutes as to fraudulent conveyances, that under its provisions a conveyance made with the intent to hinder, delay or defraud creditors, or other persons, as against them is void. (*Grover v. Wakeman*, 11 Wend. 207; *Burdick v. Post*, 6 N. Y. 522; *Seymour v. Wilson*, 14 id. 569; *Starrin v. Kelly*, 88 id. 421; *Billings v. Russell*, 101 id. 234; Sedg. on Stat. Law, 254; *Towle v. Forney*, 14 N. Y. 425.) Fraudulent intent in a conveyance is proven by the acts, circumstances and situation as to other property of the party making the conveyance. The transfers of other property and the disposition of all property are competent evidence to establish such intent. (Bump Fraud. Conv. [3d ed.] 591; *Babcock v. Eckler*, 24 N. Y. 632; *Baldwin v. Short*, 125 id. 553; *Loos v. Wilkinson*, 110 id. 195, 210, 211; *Nugent v. Jacobs*, 103 id. 125, 128; *Dunlap v. Hawkins*, 59 id. 342, 347; *Carr v. Breese*, 81 id. 588; *Livermore v. Northrup*, 44 id. 107; *Booth v. Bunce*, 33 id. 159; *Amsden v. Manchester*, 40 Barb. 158; *Newman v. Cordell*, 43 id. 448, 456; *Angrave v. Stone*, 45 id. 35; *Sweetser v. Bates*, 117 Mass. 466; *McLane v. Johnson*, 43 Vt. 48, 60; *Geisendorff v. Eagles*, 106 Ind. 38, 40.) If facts claimed to be essential can be proved as evidence of a fact alleged, then the complaint must be sufficient. (*Cole v. Jessup*, 10 N. Y. 104.) A fact which need not be proven, in every case of fraudulent conveyances, is not necessary to the sufficiency of the complaint. (*Fox v. Moyer*, 54 N. Y. 131; *Blake v. Savin*, 10 Allen, 340, 343; *Bartholomew v. McKinstry*, 6 id. 567; *Walkow v. Kingsley*, 45 Minn. 283, 285; *Ogden v. Peters*, 21 N. Y. 23; *Planck v. Schermerhorn*, 3 Barb. Ch. 644, 645.) The sole question in voluntary conveyances, when assailed for being fraudulent before the courts of this state, has been whether there was fraudulent intent in such conveyance. The state of a debtor's property

after a voluntary conveyance has only been held important for the purpose of ascertaining the intent. (*Seward v. Jackson*, 8 Cow. 406; *Dygert v. Remerschnider*, 32 N. Y. 636, 637; *Erickson v. Quinn*, 47 id. 410, 413; *Cole v. Tyler*, 65 id. 73, 78; *Dunlap v. Hawkins*, 59 id. 342, 346; *Carr v. Breese*, 81 id. 584, 588, 589; *G. R. N. Bank v. Mead*, 92 id. 637; *Jackson v. Badger*, 109 id. 632; *Smith v. Reid*, 134 id. 568, 575.) In pleading, it is sufficient to charge the legal effect of a transaction, and unnecessary to set forth the evidence or circumstances attending the transaction. It is only necessary to allege the ultimate fact constituting the cause of action. (*R. R. Co. v. Robinson*, 133 N. Y. 242; 2 Wait's Pr. 313; *Knowles v. Gee*, 4 How. 317; *Pattison v. Taylor*, 8 Barb. 250; *Hyatt v. McMahon*, 25 id. 458; *Kelly v. Breusing*, 33 id. 123; *Cahill v. Pulmer*, 17 Abb. Pr. 186; *Badeau v. Niles*, 9 Abb. [N. C.] 48; *Wooley v. Newcombe*, 87 N. Y. 605; *Rollet v. Heiman*, 120 Ind. 512, 514.) Every fact which must necessarily exist as creative of an ultimate fact alleged in the complaint is not only evidence, but is impliedly deemed to be alleged as a part of the pleading as much as if specifically alleged. (Bliss on Code Pl. § 176; 2 Wait's Pr. 315; *Hunt v. Bennett*, 19 N. Y. 173; *Patriage v. Badger*, 25 Barb. 146, 170; *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Marston v. Sweet*, 66 N. Y. 206; *Thayer v. Marsh*, 75 id. 343; *Marie v. Garrison*, 83 id. 23, 29; *Lorillard v. Clyde*, 86 id. 384.) The ruling as to the sufficiency of pleadings in fraudulent conveyances in this state has been that fraudulent intent in the conveyance is the necessary and material fact, which, if alleged, the complaint is sufficient. (*Murtha v. Curley*, 90 N. Y. 372; *Bate v. Graham*, 11 id. 237; *N. W. Bank v. Reed*, 27 Abb. [N. C.] 5; *Durant v. Piereson*, 29 N. Y. S. R. 510; *Wilcox v. Payne*, 28 id. 716; *Hastings v. Thurston*, 18 How. Pr. 530; *Jessup v. Halse*, 29 Barb. 540, 541; *B. S. Co. v. Foster*, 36 N. Y. 565, 566.) The complaint alleges facts which are conclusive evidence of fraudulent intent in the conveyance, viz.: That while plaintiff's suit was pending to recover her said judgment, this conveyance was

made by the judgment debtor to his minor daughter residing with him in consideration of her future services in his care and support during life, to cover and conceal his interest therein and to prevent the collection of plaintiff's said judgment. (*Coolidge v. Melvin*, 42 N. H. 521, 522; *Strong v. Lawrence*, 58 Iowa, 55; *Lindensparker v. Lindensparker*, 52 Maine, 481.) The consideration of the deed being in part fraudulent and void, the whole conveyance is void, and cannot stand as a security for any part of the consideration. (*Baldwin v. Short*, 125 N. Y. 553; *Davis v. Leopold*, 87 id. 620; *Mackie v. Cairns*, 5 Cow. 548.) This complaint alleges a secret interest in property which creditors are entitled to have appropriated to the payment of their just demands. Where the consideration to be paid for a conveyance of real estate is the care of and future support of the grantor, such grantor has an equitable lien upon such real estate to secure the payment of such consideration. (*Chase v. Peck*, 21 N. Y. 581, 584, 585; *Day v. N. Y. C. R. R. Co.*, 51 id. 583; *Wilbur v. Warren*, 104 id. 192; *Gillette v. Bates*, 86 id. 87; *Stephens v. Sinclair*, 1 Hill, 143; *Jackson v. Mather*, 7 Cow. 301, 305; *King v. Wilcox*, 11 Paige, 589; *Isham v. Schafer*, 60 Barb. 317; *Case v. Phelps*, 39 N. Y. 169, 170; *Dewey v. Moyer*, 72 id. 76; *Murtha v. Curley*, 90 id. 372; *Decker v. Decker*, 108 id. 128.) Conveyances pending an action to prevent the collection of the recoveries when judgments are secured are held fraudulent and void. (*Jackson v. Meyers*, 18 Johns. 425; *King v. Wilcox*, 11 Paige, 589; *Jackson v. Mather*, 7 Cow. 301; *Pendleton v. Hughes*, 65 Barb. 136; *Ford v. Johnston*, 7 Hun, 563; *Martin v. Walker*, 12 id. 46.) The alleged return of an execution unsatisfied on a judgment in an action commenced before a voluntary conveyance was made is, in such a case, evidence of the grantor's insolvency at the time of such conveyance. (*Strong v. Lawrence*, 58 Iowa, 60; *Carlisle v. Rich*, 8 N. H. 44; *Emmerich v. Hefferan*, 26 J. & S. 218; *Elwell v. Walker*, 52 Iowa, 265.)

F. A. Westbrook for respondents. The Court of Appeals on the previous appeal in this case has decided the question

here presented. (*Kain v. Larkin*, 131 N. Y. 307; *Sherman v. Hoagland*, 54 Ind. 579; *McCole v. Loehr*, 79 id. 432; *Pence v. Croan*, 51 id. 336; *Wilbur v. Fradenburg*, 52 Barb. 480; *Bank v. Mead*, 92 N. Y. 637; *Dygert v. Rem.*, 32 id. 637; *Holden v. Burnham*, 63 id. 74.) A conveyance with any consideration, no matter how trivial, cannot be treated as a voluntary one within the meaning of the statute. (*Jackson v. Reed*, 4 Wend. 300, 304; *Truesdale v. Sarles*, 104 N. Y. 167; *Walrod v. Ball*, 9 Barb. 275, 276; *Potter v. Bank*, 28 N. Y. 655; *Parker v. Knox*, 40 N. Y. S. R. 36; *Dygert v. Rem.*, 32 N. Y. 637; *Shultz v. Hoagland*, 85 id. 467; *Baird v. Mayor*, 96 id. 567; *Broeck v. Rich*, 76 Mich. 644; *Sell v. Bailey*, 119 Ind. 151.) The rule is that one cannot prove what is not alleged. Every fact which a party must prove to establish his cause of action must be stated in the pleadings. The complaint in issue is fatally defective in this respect. (*Bailey v. Ryder*, 10 N. Y. 370; *Lent v. R. Co.*, 130 id. 504; Penal Code, § 586; *Reed v. Co.*, 47 Hun, 411; *Albertoli v. Branhan*, 80 Cal. 633; *Van Weel v. Winston*, 115 U. S. 228; *Wood v. Amory*, 105 N. Y. 278; *Brackett v. Griswold*, 112 id. 454; *Hotchkin v. Bank*, 127 id. 336; *Clark v. Dillon*, 97 id. 323; *Cook v. Warren*, 88 id. 40.) The point made by the plaintiff that this is a statutory action, and that the complaint has followed the words of the statute is not well taken. (*Austin v. Goodrick*, 49 N. Y. 266; *Bartlett v. Crozier*, 17 Johns. 440.) Defendant pursued the proper practice in moving at the opening of the trial to dismiss the complaint. (Code Civ. Pro. §§ 488, 498, 499; *Sheridan v. Jackson*, 72 N. Y. 170; *Tooker v. Arnoux*, 76 id. 400; *Southwick v. Bank*, 84 id. 420; *Pope v. M. Co.*, 107 id. 62.) The allegation that part of the consideration was for future support is immaterial in this discussion. (*Flint v. Sheldon*, 13 Mass. 143; *R. R. Co. v. Hills*, 23 Vt. 681; *Corse v. Peck*, 102 N. Y. 513; *Vial v. Matthewson*, 34 Hun, 73.)

O'BRIEN, J. At the trial of this action, upon the defendants' motion, the court, without taking any proof, dismissed

the complaint upon the ground that it did not state sufficient facts to constitute a cause of action. To this ruling and direction the plaintiff's counsel excepted. The appeal, therefore, presents but a single question, and that is whether, in law, the complaint was sufficient as a pleading to give the plaintiff a standing before the court sufficient to enable her to make out her case by proof if she could. The learned trial judge, as well as the General Term, have apparently reached this conclusion upon the theory that this court, when the case was here on a former appeal, decided that sufficient facts had not been averred. (*Kain v. Larkin*, 131 N. Y. 300.) In this respect we think that the learned courts below have misapprehended the legal effect of that decision. A careful reading of the opinion of this court upon that appeal will show that we reversed the judgment then before us, rendered after a full trial, upon the ground that the facts and circumstances disclosed by the record, as it then appeared, did not sustain the findings and conclusion of the court which set aside, as void, the conveyance and transfer attacked, and not because the complaint was defective. It is true, that in discussing the questions then before us, and in pointing out defects in the proof, it was remarked that certain facts had not been proved nor alleged, but it is nowhere intimated that the complaint was defective, or that the necessary facts could not have been proven under it at the trial. Our decision proceeded upon the ground that the proofs, not the pleading, were defective and insufficient. It will be sufficiently favorable to the defendants to consider the complaint as now before us upon a general demurrer upon the ground that it does not state facts sufficient to constitute a cause of action. In such a case the demurrer cannot be sustained unless it appears, admitting all the facts alleged, that no cause of action whatever is stated. The demurrer cannot be sustained simply by showing that facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred. The pleading may be deficient in technical language or in logical statement, but, as

against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment. (*Zabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 id. 14, 23; *Sanders v. Soutter*, 126 id. 193.) The complaint in this case clearly avers the recovery of a judgment by the plaintiff against one of the defendants and the return of an execution issued thereon unsatisfied; that the judgment is still due; that after the cause of action accrued the defendant transferred his property which would be subject to the lien of an execution to his wife, daughter and brother by instruments particularly described, and that by the death of the wife and through a satisfaction of the mortgage on the real estate by the brother, and a deed to her by the plaintiff, all this property has become vested in and is now held by the daughter, who has been made a defendant, and has answered the complaint. The complaint then avers that the deed, mortgage and transfer of money in bank to defendant's credit to his wife, daughter and brother, were made without consideration, and with the intent to hinder, delay and defraud the plaintiff of her claim. The relief demanded is that the conveyances and transfer be set aside and declared void, and that a receiver be appointed for the purpose of applying the property to the payment of the judgment. For the purpose of the question now before us, we can assume that these facts all stand admitted upon the record, and when so admitted they establish a cause of action by a judgment creditor against the defendant in the execution, and his fraudulent grantees or transferees entitling him to equitable relief. A fraudulent intent on the part of the grantor and grantee is averred. The evidence necessary to support these allegations of a fraudulent intent may be, and usually is, made up of many different facts and circumstances, but it is not necessary to insert them in a pleading, and it is generally improper to do so. The pecuniary condition of the defendant at the time, the extent of his property, the part transferred and that retained, as well as the nature and extent of the plaintiff's claim, which

subsequently ripened into a judgment, were all facts bearing on the general allegation of fraud. The plaintiff could prove all these facts and circumstances under her complaint. The general allegation that a conveyance or transfer of property was made with the intent to hinder, delay and defraud creditors is broad and sweeping in its operation and effect. It involves many elements, and may, before it can be deemed established, require proof of many other facts and circumstances which may be given in evidence under the general charge, without inserting them in the pleading. We think that the plaintiff is entitled to an opportunity to prove her case, and supply, if she can, the defects in the proof pointed out by us in the review of the former judgment, and that the direction dismissing the complaint was erroneous.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

In the Matter of the Revocation of the Last Will and Testament of HOMER A. NELSON, Deceased.

The attestation clause is some proof of the due execution of a will, and where, in addition to it, there is evidence that said clause was read aloud in the hearing of the testator and witnesses, with at least the silent assent of all concerned to its statement of facts, this is sufficient to establish the facts recited.

A request to sign as a witness, made by the person superintending the execution of a will, in the hearing of the testator, and with his silent permission and approval, is sufficient.

The attestation clause to a will contained the usual statement that the person who executed the instrument had signed, published and declared it to be his last will and testament; it omitted to recite that the witnesses were requested by the testator to sign the will as such. In proceedings to revoke probate of the will, K., the only surviving witness, denied that the decedent made such a request. K. had been a servant of the deceased for many years, and was disappointed at not finding in the will some legacy for himself; he admitted that B., the other witness, in the presence of the testator, requested him to sign the will, but denied that the decedent in any manner assented, except by silence, and stated

that he was apparently inattentive. Declarations of the witness were proved to the effect that when he came into the room the decedent said he wanted him to witness his will. The testator was a lawyer of eminence and ability, who well knew the requirements for its due execution, as did also B., who was also a lawyer, the partner of the decedent. B. drew the will and superintended its execution. K. was sent for with a view of his becoming a subscribing witness, either by the testator or with his assent. B. read the attestation clause aloud, in the presence of decedent and K. The will was signed by the testator, and both witnesses signed the attestation clause; K. testified that B. then put the will in an envelope and took it away, at the request of the testator, who thereafter recognized it as an existing, executed and completed instrument. B. died more than twelve years thereafter, and thereupon the will in its envelope was delivered to the testator, who opened the package, examined the instrument and receipted for it as his will. *Held*, the evidence was sufficient to justify a finding that the will was duly executed.

(Argued January 17, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a decree of the Surrogate's Court of the county of Dutchess denying and dismissing a petition for the revocation of probate of the last will and testament of Homer A. Nelson, deceased, and ratifying and confirming the prior probate thereof.

The facts, so far as material, are stated in the opinion.

Martin J. Townsend for appellants. The Surrogate's Court erred in admitting proof of what Judge Nelson said from time to time in relation to his alleged will, and of his condition when it was made. (*Johnson v. Hicks*, 1 Lans. 159; *Waterman v. Whitney*, 11 N. Y. 161.) The testatum clause is entirely silent on the question whether Judge Nelson requested either of the witnesses to sign the will as witnesses to it, and Keller's signature to the testatum clause proves nothing on that subject, and if the proponents have actually succeeded in destroying Keller's credibility, they simply stand without any evidence that Judge Nelson, either directly or indirectly, requested anybody to sign the will as a witness. (*Cottrell's Will*, 95 N. Y. 339.) The failure of Judge Nelson

to request the witnesses to subscribe the will as such, is not compensated by Baker's simple direction to sign. The direction of Baker to the witness to sign the paper could never become a legal substitute for the testator's request without proof that the testator knew of the request, and in some form assented to it. (119 N. Y. 615; *Lane v. Lane*, 95 id. 494.)

E. Countryman for respondents. The findings of fact, as affirmed in the General Term, if there was any evidence to sustain them, are conclusive in this court; and as such findings are sufficient in law to warrant the probate of the will, they are now decisive of the merits of the controversy. (*Whitmore v. Foley*, 125 N. Y. 651; *Hewlitt v. Elmer*, 103 id. 156, 161; *In re Cottrell*, 95 id. 329, 333; *In re Bull*, 111 id. 624, 629; *Marx v. McGlynn*, 88 id. 357, 369; *In re Ross*, 87 id. 514; *Kingsland v. Murray*, 133 id. 170.) It was proven by Keller, the sole surviving witness, who attested the execution of the will, that the scrivener (Mr. Baker) read aloud the attestation clause, and that clause was in fact signed by both the attesting witnesses. (*Peck v. Cary*, 27 N. Y. 9; *In re Pepson*, 91 id. 256; *Brown v. Clark*, 77 id. 369; *Blake v. Knight*, 3 Curtis, 547; *Wright v. Rogers*, L. R. [1 Prob. Div.] 678; *Woodhouse v. Balfour*, 13 id. 2; *Wright v. Sanderson*, 9 id. 149.) The attestation clause, it is true, is defective in one respect, in that it does not recite a request by or on behalf of the testator to the witnesses to attest the execution of the will. But this was evidently a mere clerical error, an inadvertent omission of the scrivener, and that omission is practically supplied by the surviving witness, Keller himself, who testified that the scrivener said to him in the presence of the testator: "I want you to sign this will, or this paper; something like that; to that effect." (*Gilbert v. Knor*, 52 N. Y. 125; *In re Phillips*, 98 id. 267.) The surrogate clearly had a right to discredit Keller's testimony and to admit the will to probate in direct opposition to the evidence, even of all the attesting witnesses. (*Tarrant v. Ware*, 25 N. Y. 425; *In re Cottrell*, 95 id. 330-340; *In re Kellum*, 52 id.

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517.) There was no error committed in allowing the proponents to contradict and impeach the testimony of Keller as one of the attesting witnesses to the will. (*Thornton Case*, 39 Vt. 122.)

FINCH, J. This appeal is from an affirmance by the General Term of an order of the surrogate of Dutchess county refusing to revoke the probate of the last will of Homer A. Nelson. No question is raised as to the capacity of the testator or his freedom from any undue or improper influence, and the whole contest is over the inquiry whether the statutory requirements for the due execution of the will were all observed. That is a question of fact upon which the findings are conclusive unless it appears in the record that there is no evidence tending to sustain them, and our examination of the case must be directed to that inquiry. It may be narrowed still further. The will bears the signature of the testator and the attestation clause those of Baker and Keller, the two subscribing witnesses. There is not the least doubt of the genuineness of all these signatures. It is also certain that they were appended on the day of the execution of the will and before Keller left the room, for he says that Baker put the will in an envelope and took it away at the request of the testator, and at least twelve years thereafter, Baker having died, the will in its envelope was delivered to the testator, who opened the package and examined the instrument and receipted for it as his will. That the testator on March 3d, 1878, which was the date of the attestation, knew perfectly that he was engaged in a testamentary act is evident not only from what occurred in his presence, but from his own later statement of the reason which induced him to make his will on that occasion. Baker knew the exact nature of the transaction, for he drew the will and superintended its execution. And Keller knew it, not only from what was said to him, but from his repeated description of the scene as a solemn occasion. The attestation clause was read aloud by Baker in the presence and hearing of the testator and Keller, so that the testator knew what it recited as emanating from him, and

the witnesses what it declared as having occurred in their presence. To all that was thus represented to have been said or done by the testator he assented by the approval of silence, if nothing more, and the witnesses knowing its recitals certified to their truth by their signatures. The attestation clause is always some proof of the due execution of the will (*Matter of Will of Cottrell*, 95 N. Y. 339), and where beyond its presence the proof is that it was read aloud in the hearing of testator and witnesses with at least the silent assent of all concerned to its statement of facts, it cannot be denied that there is some, and quite persuasive evidence of the actual occurrence of the facts recited. When Baker read the statement, obviously speaking for the testator and in his behalf, that he had signed, published and declared the instrument in question as and for and to be his last will and testament, his silent assent to the declaration, if he was so silent, furnished evidence of his concurrence and approval: evidence upon which the witnesses at once acted and without hesitation, and which is put beyond the possibility of mistake by the testator's after recognition of the will as an existing, executed and completed instrument. If the attestation clause thus read and adopted had been full and perfect it would have served, in connection with the other proof, to have justified the probate; but it was not full and perfect, owing to the omission of one of the needed requirements, and it is about that one, omitted from the recital, probably by accident, that it is possible reasonably to contend that there was an utter failure of evidence. That omission was of a request by the testator to the witnesses to sign the will as such, and is open to dispute not only because so omitted, but because the surviving witness denies the fact. He admits, however, that Baker, in the presence of the testator, requested the witness to sign the will, but denies that the decedent in any manner assented, unless by silence, and takes from that some of its force by representing him as apparently inattentive. This witness was Judge Nelson's coachman, who had been in his service for many years, but was disappointed in not find-

ing in the will some legacy for himself. His evidence as a witness was strongly contradicted by his own earlier statement to Mr. Lown that when he came into Judge Nelson's room the latter said that he wanted him to witness his will. It is thus certain that either Baker, speaking in behalf of the testator, or the latter himself made that request, and it is much the most probable that it came from the testator. Somebody sent for the coachman with the view of making him a subscribing witness to the will. Mrs. Nelson was not at home, and Miss Laura Nelson was not present, and does not appear to have even been aware of what was transpiring. The summons came from the room where the testator and Baker were alone together, and must have been directed by the testator's selection, or, at all events, with his assent, and when Keller came into the room it is quite certain that one of the two told him what he was wanted for. If it was Baker, as the witness testified, that was enough, for in doing so he plainly acted for the testator with his assent and in pursuance of his selection. The request to sign is sufficient, if made by the person superintending the execution of the will, if in the hearing of the testator and with his silent permission and approval. That was held in *Doe v. Roe* (2 Barb. 205), and again in *Peck v. Cary* (27 N. Y. 9) and *Gilbert v. Knox* (52 id. 128). Judge Nelson himself was a lawyer of eminence and ability, well knowing what was needed for the due execution of a will, and Baker was his partner and fully competent to perform the duty which he undertook, and it is not a reasonable supposition that they neglected any essential requirement. The accidental omission in the attestation might easily occur, and that it escaped the notice of both serves only to indicate the fatality which seems to attend the wills of distinguished lawyers.

The proof of Judge Nelson's declarations and acts, occurring after the execution of the will, was admissible to show his knowledge of the testamentary character of the instrument and to dispel any possible claim of mistake or imposition. Similar evidence has often been received, and we can see no ground on which it should have been excluded.

Taking all the facts together, they warranted the findings of the surrogate, and leave no doubt in our own minds that the will was properly executed.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

141	158
141	590
141	158
148	185
141	158
180	199
141	158
f165	362
141	158
168	245

NELLIE QUINLAN, an Infant, by Guardian, etc., Respondent,
v. JAMES H. WELCH, Appellant.

The Civil Damage Act of 1873 (Chap. 646, Laws of 1873) is not a penal statute, but simply creates a cause of action unknown to the common law. Said act was not repealed by the provision of the act of 1892, "in relation to excise" (§ 2, chap. 408, Laws of 1892), providing for the recovery of damages caused by the sale of intoxicating liquors in case previous notice has been given forbidding the sale. The said provision and the one upon the same subject in the act of 1892, "to revise and consolidate the laws in relation to the sale of intoxicating liquors" (§ 40, chap. 401, Laws of 1892), are to be read as simply amendatory of the act of 1873, not as repealing it by implication.

A cause of action, therefore, which accrued prior to said amendments was not affected thereby.

In an action under said act of 1873 these facts appeared: Q., the father of plaintiff, who was a skilled workman and the sole support of his wife and family, and who lived in the village of P., on the afternoon of June 17, 1891, being in the village of O., visited its saloons, and among them one owned by defendant and rented by him to one whom he knew was selling intoxicating liquors therein on that day. Q. drank heavily, and in the evening boarded a train to return home; he was at that time much intoxicated; he left the train at a station before it reached P., and in attempting to walk on the railroad track to the latter place was killed; his mutilated body was found the next morning on the track, midway between that station and his home. *Held*, that the evidence was sufficient to submit to the jury as to all the essential facts required to be established to sustain the action; and so that a refusal to nonsuit was not error.

The testimony showed that plaintiff was born on June eighteenth, at what hour it did not appear, nor did it appear whether Q. was killed on the morning of that day or on the previous evening. Defendant on appeal for the first time claimed that plaintiff was born after her father's death, and so, could not maintain the action. *Held*, untenable; that, conceding the point was presented by the proofs, as to which *quere*, it should have

been raised on trial, and the attention of the trial court not having been called to it, it could not be considered on appeal. •

Reported below, 69 Hun, 584.

(Argued January 18, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Arthur Corbin for appellant. Plaintiff cannot recover because no such notice as required by chapter 403, Laws of 1892, was ever served or given in any manner. Chapter 646, Laws of 1873, is repealed by chapter 403, Laws of 1892, and at the time of the trial the latter act was the only law in force giving or creating a cause of action in such a case as this, and the law in force at the time of the trial governed the rights of the parties, even though plaintiff's alleged cause of action arose before the enactment thereof. (*Town of Duaneburgh v. Jenkins*, 57 Hun, 178; *In re Inst. for Deaf & Dumb*, 121 N. Y. 218; *People v. G. & S. T. Co.*, 98 id. 67; 32 Hun, 491; *People v. Jaehne*, 103 id. 182; *Anderson v. Anderson*, 112 id. 104; *Munger v. People*, 55 id. 112; *People ex rel. v. City of Brooklyn*, 69 id. 605; *Dash v. Van Kleeck*, 7 Johns, 477-479; *C. M. Co. v. Vanderpoel*, 6 Cow. 566; 16 Barb. 15; *In re Southworth*, 5 Hun, 55; *Lyddy v. Long Island City*, 104 N. Y. 218; *Heckman v. Pinkney*, 81 id. 211-215; *E. P. Co. v. Lacy*, 63 id. 422; *Livingston v. Harris*, 11 Wend. 329; *People ex rel. v. Bell*, 47 N. Y. 57-68.) But, irrespective of any question of repeal by implication, plaintiff could not maintain this action, because at the time of the trial the statute of the state provided that the action could not be maintained unless notice has been given to the licensee or his agents, or to the person

or persons selling or giving away, etc. As plaintiff has no cause of action against defendant at common law, her cause of action, if any exists, must be brought within the provision of the statute, which cannot be extended by implication to create a cause of action not by its express terms created, nor in favor of any person to whom such cause of action is not by the express terms given. (*V. C. C. Co. v. Murtaugh*, 50 N. Y. 314; 4 Lans. 17; *Bonnell v. Griswold*, 80 N. Y. 128; 18 Hun, 496; *Cayuga Nation of Indians v. State*, 99 N. Y. 235.) The statute does not allow a recovery for damages to means of support as provided by the old law, but only for an injury to persons or property in consequence of the intoxication, and, therefore, does not allow a recovery of damages for the death of any person in consequence of intoxication, because such an action cannot be maintained at common law and the statute does not by its terms provide it. Nor does it provide for an action by a posthumous child in any case. (*People ex rel. v. Albertson*, 55 N. Y. 50.)

F. W. & E. F. Kruse for respondent. The excise statutes of 1892 (Chaps. 401 and 403) did not repeal the Civil Damage Act of 1873 (Chap. 646), nor do they have retroactive effects so as to abrogate existing rights which had accrued under the Civil Damage Act of 1873, when the excise acts of 1892 became laws. (*Reinhardt v. Fritzsche*, 69 Hun, 565; *Bullock v. Town of Durham*, 64 id. 380; *Sanford v. Bennett*, 24 N. Y. 20; *Dash v. Van Kleeck*, 7 Johns. 477; *People v. Supervisors*, 43 N. Y. 130, 134, 136; *People v. McCall*, 94 id. 590; *In re Miller*, 110 id. 216; *In re Prime*, 136 id. 347; *Davies v. Fairbairn*, 3 U. S. 636, 645; *Bertholf v. O'Reilly*, 74 N. Y. 509, 513; *Volans v. Owens*, 74 id. 526; *Dudley v. Parker*, 132 id. 186; *Hall v. Germain*, 14 N. Y. Supp. 5; *Comstock v. Hopkins*, 15 id. 908.) Whether the act of 1892 repealed by implication or only amended the act of 1873 it did not have the effect to destroy the plaintiff's vested right which had accrued under the act of 1873 prior to the act of 1892. (*Sanford v. Bennett*, 24 N.

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Y. 20; *Vanderkar v. S. R. R. Co.*, 13 Barb. 393; *Eastman v. Clackamas Co.*, 32 Fed. Rep. 24; Potter's Dwarries on Statutes, 162; Endlich on Interp. of Stat. 480, 481; *In re Miller*, 110 N. Y. 223.) The legislature did not intend to abrogate and destroy the rights of persons who, acting under the Civil Damage Law of 1873, were seeking to enforce the same at the time when the subsequent acts were passed. (*Smith v. People*, 47 N. Y. 330; *People ex rel. v. Davenport*, 91 id. 574; *Dash v. Van Kleeck*, 7 Johns. 502; *Volans v. Owens*, 74 N. Y. 530.) The point made on behalf of the appellant that the plaintiff cannot maintain this action for the reason that she was born the day after her father died is untenable. The question was not presented in the trial court and for the first time at General Term, and not having been presented on the trial cannot be raised on appeal. (*Binnse v. Wood*, 37 N. Y. 526, 532; *Thayer v. Marsh*, 75 id. 340; *Sterrett v. F. N. Bank*, 122 id. 659.) But, assuming that the child was not born until the day after the death of her father, she was injured in her means of support in consequence of the death of her father, and for this she has a cause of action against the defendant under the Civil Damage Act. (*The George & Richard*, L. R. [3 Adm.] 465.) The facts establish a cause of action against the defendant. (*McCarthy v. Wells*, 51 Hun, 171; *Meade v. Stratton*, 87 N. Y. 493.)

BARTLETT, J. The plaintiff, the infant child of Dennis Quinlan, deceased, brings this action under chapter 646 of the Laws of 1873, known as the "Civil Damage Act," to recover damages for her father's death, caused, as alleged, by the sale of intoxicating liquors to him by one O'Leary, the tenant or occupant of premises owned by the defendant, James H. Welch. At the opening of the trial it was conceded that the store and premises in Olean, at which it is alleged that the intoxicating liquor was sold June 17th, 1891, were then owned by the defendant, and that he rented them to O'Leary some time prior to that date, and knew that O'Leary was selling intoxicating liquors there on the 17th day of June, 1891.

The action was tried at the Cattaraugus Circuit in September, 1892, and resulted in a verdict for plaintiff.

Dennis Quinlan, the deceased, lived at Portville; he was an industrious man, employed by the Portville Tanning Company as a skilled workman, and the sole support of his wife and family by day's labor, he having no property; he arrived in the village of Olean on the afternoon of the 17th day of June, 1891, and with several companions visited the saloons of the town, the defendant's premises among others, and drank heavily; the evening of that day he boarded a train to return home, and was at the time much intoxicated; he left the train at Weston early in the evening, and the next morning about eight o'clock his mutilated body was found on the railroad track midway between Weston and Portville.

It does not appear when the deceased met his death; he evidently attempted, during the night, to walk on the track from Weston to Portville.

The defendant moved for a nonsuit practically on two grounds, failure of proof and the absence of the notice required by chapter 403 of the Laws of 1892.

As to alleged failure of proof, we are of opinion that there was sufficient evidence to submit to the jury as to all the essential facts necessary to sustain this action under the Civil Damage Act of 1873, and the verdict is conclusive.

The defendant's contention that chapter 403 of the Laws of 1892 is applicable to this case presents the principal point on this appeal.

The second section of that act, which was passed April 30th, 1892, reads as follows, viz.:

"§ 2. A recovery may be had in a civil action of the damages suffered by reason of the intoxication of any person from any person or persons who shall, by selling or giving away intoxicating drink, have caused such intoxication, or from any persons owning or renting or permitting the occupation of any building or premises wherein such selling or giving away shall have occurred, jointly with the person or persons selling or giving away, or severally, if the person or persons suffering

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such damage shall, previous to such selling or giving away, have given written notice to the licensee or his agents, or the person or persons so selling or giving away, forbidding such selling or giving away to the person whose intoxication shall have caused such damage, and not otherwise."

It is insisted that this statute repealed by implication chapter 646 of the Laws of 1873, and that even if the legal effect was amendment and not repeal, the right of action, accruing to defendant in June, 1891, under the act of 1873, and by virtue of which she had commenced this action, was taken away.

We regard both these propositions as unsound. The second section of chapter 403 of the Laws of 1892 does not cover the whole subject-matter of chapter 646, Laws of 1873, and its only effect is to amend the latter statute by requiring a certain notice in writing to be given before a cause of action can accrue.

Whether a subsequent statute repeals a prior one, in the absence of express words, depends upon the intention of the legislature. (*Anderson v. Anderson*, 112 N. Y. 111.)

While this intent is sufficiently manifest in the case at bar, upon the reading of the subsequent statute, our attention has been called to the fact that on the same day chapter 403 of Laws 1892 was approved by the governor April 30th, 1892, and one hour before such approval, the executive approved chapter 401 of the Laws of 1892, known "as an act to revise and consolidate the laws regulating the sale of intoxicating liquors."

Section 40 of this act clearly recognizes the action created by chapter 646 of the Laws of 1873, and provides no recovery shall be had "unless one of the persons who might have such a cause of action * * * shall, prior to such sale or giving away, have given written notice to the person selling or giving away such intoxicating drink, forbidding such sale," etc.

The subsequent act (Chapter 403, Laws of 1892), which became law an hour after the above statute, is entitled "An act in relation to excise," and provides in the first section for the appointment of the clerks of excise boards, and the second section deals with the subject of notice as contained in chap-

ter 401, Laws of 1892, section 40, already quoted, and provides the notice shall be given "to the licensee or his agents, or the person or persons so selling or giving away," etc., thus increasing the number of persons to whom notice may be given. It also extends the application of the notice to actions against persons owning or renting or permitting the occupation of premises where the offense occurred, which was not covered by said section 40. It is quite clear that the later statute was intended to supply omissions in the earlier one, and that both are to be read as amendatory of chapter 646, Laws of 1873, and not as repealing it by implication.

The defendant, however, insists that treating chapter 403 of Laws of 1892 as amending chapter 646, Laws of 1873, its effect was to deprive plaintiff of her cause of action, which accrued in June, 1891.

The Civil Damage Act of 1873 is not a penal statute, but creates a cause of action for damages which was unknown to the common law.

This court held in *Volans v. Owen* (74 N. Y. 530) that "the primary purpose of the legislature in giving a right of action for an injury of this character was the protection of the dependent and helpless."

The repeal of a penal statute discharges offenses committed before such repeal and proceedings based thereon. (1 Hale's Pleas of the Crown, 291; *Hartung v. People*, 22 N. Y. 99, 100; *Curtis v. Leavitt*, 15 id. 229; *Butler v. Palmer*, 1 Hill, 324.) This statute of 1873 being in no sense penal it falls within the rule which has long existed and was recognized by this court in *Matter of Miller* (110 N. Y. 216).

The question presented in that case was whether a beneficiary who had become liable to pay a tax under the Collateral Inheritance Act of 1885 (Ch. 483) was released from the payment thereof by chap. 713, Laws of 1887, which was enacted before payment of said tax and under the terms of which the tax was not imposed.

Judge DANFORTH, at page 223, says :

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"The surrogate and the Supreme Court, however, thought the case made by the petitioner should be decided as if the act of 1887 had not been passed, and we are of that opinion. The rule is considered settled in this state that neither original statutes nor amendments have any retroactive force, unless in exceptional cases as the legislature so declare." (*Dash v. Van Kleeck*, 7 Johns. 477; *Sanford v. Bennett*, 24 N. Y. 20; *People ex rel. Newcomb v. McCall*, 94 id. 587-590.) In the latter case Judge EARL says, at page 590: "It is a general rule often reiterated and laid down in reported decisions that laws should be so construed as to be prospective and not retrospective in their operations unless they are specially made applicable to past transactions and to such as are still pending." We, therefore, hold that plaintiff's cause of action was not affected by either chapter 401 or 403 of the Laws of 1892.

There only remains to be considered a point raised by defendant for the first time at the general term to the effect that plaintiff having been born after her father's death could not maintain this action.

It appeared by the testimony of the widow of Dennis Quinlan that the infant plaintiff was born on the 18th of June, 1891, and the witness adds, "the day after her father was killed." This latter statement was inference or inadvertence, as there is no proof whether the father met his death on the evening of June 17th or the morning of June 18th, 1891.

This point is, therefore, not presented under the proofs, as it is possible the deceased met his death after midnight of the 17th of June, 1891, and it does not appear at what hour on the 18th of June, 1891, the plaintiff was born.

It is not necessary, however, to decide whether the point is presented under the proofs as the defendant should have raised it at the circuit on his motion for nonsuit if he desired its consideration here.

This court has repeatedly held that a motion for a nonsuit or to dismiss the complaint to be effectual must specify the defects supposed to exist. (*Binsse v. Wood*, 37 N. Y. 532;

Thayer v. Marsh, 75 id. 340; *Sterrett v. Third Nat. Bank of Buffalo*, 122 id. 659.)

The reason of the rule is obvious, as it affords an opportunity to supply additional proofs where it is possible.

After a careful consideration of this case we are of opinion that the judgment and order appealed from should be affirmed, with costs.

All concur.

Judgment affirmed. _____

In the Matter of the Probate of the Last Will and Testament
of GEORGE A. BARTHOLOICK, Deceased.

The provision of the Code of Civil Procedure (§ 2622) requiring a surrogate, before admitting a will to probate, to "inquire particularly into all the facts and circumstances," and that he "must be satisfied of the genuineness of the will and the validity of its execution," applies equally to wills of real and of personal property, and the same proof is required as to each upon the questions stated.

When, upon presentation for probate of an instrument purporting to be a will of real and personal property, the question as to its genuineness and the validity of its execution is properly presented by a person having the right to raise it in some capacity, it is the right and duty of the surrogate to wholly refuse probate if he becomes satisfied and finds that the testator had not mental capacity to make a will, or that the instrument offered for probate was obtained by fraud and undue influence; he is not required to admit it as a will of personal property, although the only person contesting the probate is interested solely as heir at law, and is not one of the next of kin.

In re Kellum (50 N. Y. 298), distinguished.

Upon presentation of such an instrument for probate the only contestant was K., a grandniece of the testator, who filed objections charging fraud, undue influence and mental incapacity; all others interested acquiesced in its probate. The surrogate decided in favor of the probate, and the instrument was proved as a will of real and personal estate. K. alone appealed; she described herself in the notice of appeal as an heir at law, but appealed "from each and every part of the decree." The General Term reversed the decree, stating that the reversal was on a question of fact, and ordered a new trial before a jury, upon the questions as to whether the testator was of unsound mind when the will was executed, and whether it was procured by undue influence, fraud or deceit. Both these questions the jury, upon

sufficient evidence, answered in the affirmative. The surrogate was requested to confine his decree to a refusal to admit the instrument to probate as a will of real estate, leaving the probate to stand as a will of personalty; this he refused, and entered a decree adjudging it to be wholly invalid, and revoking the former probate. *Held*, that this court, on appeal from an order of General Term affirming the last decree, had no power to review the first order of that court; and that as that order reversed the whole decree admitting the will to probate, and as the surrogate had found the will not duly executed, this prevented its probate for any purpose whatever.

The surrogate attached to the last decree, but not as forming part of it, a memorandum, to the effect that he entered it as made because the General Term had reversed the former decree wholly, without limiting the reversal to the probate of the will as a will of real estate, and he, therefore, considered himself precluded from so limiting the decree. *Held*, that this was immaterial, and in no way affected the decree.

(Argued January 18, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which affirmed a decree of the Surrogate's Court of Monroe county denying probate to the last will and testament of George A. Bartholick, deceased.

George A. Bartholick died in Monroe county in July, 1888, leaving an alleged will which related to real and personal estate. Charles Flaherty was named as a legatee in and as one of the executors of the will. The testator left him surviving his widow, Julia A. Bartholick, a brother, Joshua Bartholick, and a granddaughter of a deceased sister, being his grand-niece, Mrs. Luisita B. Kirley. These were all the persons entitled as heirs at law or next of kin to any share in the estate of the testator.

The executor presented the will for probate to the surrogate of Monroe county, and the above-named parties were all duly cited and appeared. Mrs. Kirley filed objections to the probate of the will, and charged fraud, undue influence and mental incapacity. All the others acquiesced in its probate. The surrogate decided in favor of the proponent, and the will was, in March, 1889, proved as a will of real and personal estate. Mrs. Kirley alone appealed to the General Term of the

Supreme Court, and in the body of the notice of appeal she is described as one of the heirs at law of the deceased, but she appealed "from the decree entered herein on the 18th day of March, 1889, and from each and every part thereof." In January, 1891, the General Term reversed the judgment of the surrogate admitting the will to probate, and stated that it was reversed on a question of fact, and granted a new trial to be had before a jury upon the questions (1) whether the testator was of unsound mind when the will was executed, and (2) whether the will was procured by undue influence, circumvention, fraud or deceit.

These questions were then tried before a jury, who answered them both in the affirmative, and upon evidence which is admitted to have been sufficient to justify the finding that the instrument was procured by fraud and undue influence on the part of the executor and another person, who was also named as a legatee in the instrument. The papers were then certified to the surrogate, and a proposed decree was presented in which the proponent desired to have inserted such language as would confine the decree of the surrogate then to be entered to a refusal to admit the will to probate as a will of real estate only, leaving the probate of the will to stand as a will of personality. The surrogate, however, entered a decree adjudging and decreeing that the will dated June, 1888, was invalid and of no effect, and revoking and setting aside the former record and probate of the instrument.

The surrogate added at the foot of his decree (not to form a part of it, but to be filed with the papers at the request of counsel for proponent) a statement that he entered the decree in the form mentioned because the Supreme Court had reversed the former decree entered by the surrogate without limiting the reversal to the probate of the will as a will of real estate, in which the contestant, the grandniece, was alone interested, and he considered he was, therefore, precluded from limiting the decree to the real estate only, as requested by counsel. The counsel for proponent filed exceptions to the decree as entered, and then appealed to the General Term,

where the decree was affirmed, and the proponent now appeals to this court.

J. W. Stebbins for appellant. In a will of both realty and personalty each kind of property retains its distinctive character, and is governed by the law peculiar to it, as much as though in separate instruments; neither is, nor can be affected by the law governing the other though in the same instrument. The title to the personalty passes to the executor or administrator in trust and through him on final settlement to the next of kin, widow or legatee. The title to the realty passes directly to the heir at law or devisee subject to the right of dower (if there be a widow) which passes in the same manner. (*In re Kellum*, 50 N. Y. 298; 6 Lans. 1, 168; *In re Gourand*, 95 N. Y. 260; *Hoyt v. Hoyt*, 112 id. 505.) If the decision of the General Term is to be held as reversing the probate of the will as to the personalty as well as the realty, then the General Term erred. (50 N. Y. 298.) The General Term erred in that part of its order of January 6, 1891, ordering a trial by jury at the Circuit, instead of sending the case back to the surrogate for re-trial. (*In re Latz*, 110 N. Y. 661; *Roe v. Boyle*, 81 id. 305; *Sutton v. Ray*, 72 id. 482; *Holcomb v. Holcomb*, 95 id. 316; *In re Eysman*, 121 id. 577.) Though devisees or legatees may appear on the probate of a will, they cannot be heard to support or oppose the probate except in support of their interests. (Dayton on Surrogates, 159; *In re Malcolm*, 1 Redf. 200.)

J. A. Stull for respondent Kirley. It is both the policy of the law and requirement of the statute that no instrument shall be admitted to probate as a will unless the court is satisfied of its "genuineness" and the "validity of its execution" (Code Civ. Pro. § 2622); that it was "duly executed" and "that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint." (Code Civ. Pro. § 2623; *Cooper v. Benedict*, 3 Bradf. 136; *Delafield v. Parish*, 25 N. Y. 34.) But there were in fact before the court in this proceeding, objecting to the probate

of the alleged will in question, persons of the classes described in section 2617 of the Code of Civil Procedure, and who, therefore, had a right to be there and oppose the probate, and for that reason, also, the judgment appealed from was correct. (*Merrill v. Ralston*, 3 Redf. 290; *In re Greeley*, 13 Abb. [N. S.] 399.) This appeal, for the purpose for which it was brought, comes too late. If there has been any error in the proceedings herein in respect to the sole point complained of, such error was contained in the order of reversal made by the General Term, Supreme Court, on the former appeal, and that order should have been appealed from directly to the Court of Appeals if proponent did not intend to waive the point he now makes. (Code Civ. Pro. § 90, subd. 2.)

George F. Yeoman for respondents Allen et al. Where a judgment is entered which is not in accordance with the verdict or decision upon which it is based, the remedy is not by appeal. (*Waterman v. Ball*, 64 How. Pr. 368, 377, 378; *Bennett v. Couchman*, 48 Barb. 73.) The order of the General Term cannot be reviewed upon this appeal, although the notice of appeal says that it is intended to review it here. (Code Civ. Pro. § 2571; *Wiener v. Morange*, 7 Daly, 446.) The order of the General Term was right as to reversing as to all parties. (Code Civ. Pro. §§ 2573, 2586, 2587; *Burger v. Burger*, 111 N. Y. 527; *Clayton v. Wardell*, 2 Bradf. 1; *Herman on Estoppel & Res Adjudicata*, § 293; *Freeman on Judgments*, §§ 607, 608; *Black on Judgments*, § 635; *Woodruff v. Taylor*, 20 Vt. 65; *Bogardus v. Clark*, 4 Paige, 623.) These administrators are given the right to intervene for the purpose of appealing, although they do not file objections. (Code Civ. Pro. § 2569.)

PECKHAM, J. In providing for the distribution of the personal estates of intestates the statute prohibits any representation among collaterals after brothers' and sisters' children. (2 R. S. 96, sec. 75, subdiv. 11.) It is, therefore, claimed that Mrs. Kirley had no right to appeal from the first decree of the surrogate, so far as that decree admitted the instrument

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to probate as a will of personal property. In fact she did appeal from the whole decree. We do not think it necessary, in this case, to go back of the reversal by the General Term of the decree of the surrogate admitting the will to probate and directing the trial of the issues of fact by a jury. The General Term had jurisdiction of the case by virtue of the appeal. If the court acted erroneously in reversing the probate of the instrument as a will of personal property, it did not act without jurisdiction, and its order, even though erroneous in that respect, was not void. At the worst it was an error of law, and if inadvertent merely the proponent could have moved in that court to correct the form of the decree by limiting it to real estate, or in either event he could have appealed to this court. Although we cannot review an order of the General Term reversing on the facts a decree of the surrogate admitting a will to probate and directing a trial by jury, yet, if in such an order an error of law is made, that error can be corrected by appeal. (*Sutton v. Ray*, 72 N. Y. 482; *Burger v. Burger*, 111 id. 523.)

Having gone down and tried the whole case before the jury, and the surrogate having entered the decree upon that verdict, refusing probate of the instrument, and the General Term having affirmed it, the proponent cannot on this appeal from the last order of the General Term review its first order under a claim that it is an intermediate one, necessarily affecting the order last appealed from. (*Matter of Will of Budlong*, 126 N. Y. 423.) The section of the Code pertaining to appeals from surrogates' decrees (§ 2571) has the same purpose as those sections (§§ 1316, 1317) which relate to appeals from orders and judgments in other courts. Having jurisdiction the Supreme Court reversed the whole decree of the surrogate on questions of fact and directed the trial of the issues by jury. The criticisms of counsel upon the reasons given by the General Term for a reversal are not material. The court does reverse the surrogate's decree upon a question of fact. It says so in its order of reversal. We are concluded by it.

Coming down to the trial before the jury we find the result of that trial to be in favor of the contestant. With the answers of the jury to the questions propounded, the parties appeared before the surrogate and he was then called upon to enter the appropriate decree. These answers show that the will was procured by fraud, undue influence and deceit on the part of the executor and another person also a legatee, and that at the time of the execution thereof the testator was of unsound mind and memory and was incapable of making a will. The finding of the jury, standing as it did in full force, was the exact equivalent to a finding by the surrogate to the same effect. Upon such a finding based upon evidence legally taken has the surrogate any legal right to admit a will to probate for any purpose? The statute directs that the surrogate before admitting a will to probate must inquire particularly into all the facts and circumstances and must be satisfied of the genuineness of the will and the validity of its execution. (Code of C. P. § 2622.) The same proof is required in regard to wills of both real and personal estate upon the question stated in the above section. When the question is properly raised by a party having the right to raise it in some capacity, and where, upon the investigation which succeeds, the surrogate becomes satisfied and finds that the testator had not mental capacity to make a will, and that the instrument offered for probate was obtained by fraud and undue influence, we think the surrogate has the right, and that it is his duty, to wholly refuse to probate such an instrument, even though the contestant who prosecutes the controversy is only interested as an heir at law and is not one of the next of kin. The finding necessarily shows that no will was ever executed according to law, and the surrogate is not obliged to stultify himself by admitting the will to probate as a will of personal property only, because of the absence of some one contesting such probate as next of kin. There was a valid contest by one who had a legal standing in court, and upon that contest the fact appeared that the alleged testator was incapable of making any will, on the ground of mental incapacity. The

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surrogate's duty under the statute is to inquire and become satisfied of the existence of the necessary facts, and having that right and duty, if he become satisfied and finds as is herein stated, he ought to refuse probate of the instrument for any purpose.

This is not the same as the case of *In re Kellum* (50 N. Y. 298). There the will relating to both real and personal estate had been duly admitted to probate, and as a will of personal estate the probate was conclusive. The surrogate's judgment had never been reversed. But by the provisions of the Revised Statutes (2 R. S. 61, §§ 30 to 39) the next of kin were permitted within one year after the probate to contest the validity of the will as a will of personal property. It was held by this court that the statute applied in the case of a will which related to both real and personal property, and that the next of kin might within the year contest such will as one of personal property, while the probate of the instrument as a will of real property would stand unaffected by such contest or its result. The terms of the statute limited the contest to one regarding the will as relating to personal estate only, and hence the probate already duly made and existing as relating to real estate was not to be affected. In this case the Supreme Court set aside and reversed the whole decree, and the surrogate, upon a proper contest prosecuted by one having a standing in court and an interest to be affected, has now found the proposed will was not duly executed, and even when the contest is made by an heir at law only, the finding of the surrogate prevents the probate of the instrument as a valid will for any purpose whatever. The fact that there is contained in the record here a memorandum of the surrogate showing his reason for not limiting his decree to a refusal to admit the will to probate as one relating to real estate only, is of no importance. The action of the surrogate was valid in refusing probate to the will for any purpose, and his reasons are not material.

The judgment of the General Term should, therefore, be affirmed, with costs against the proponent personally.

All concur.

Judgment affirmed.

TERENCE McCracken, Respondent, v. WILLIAM C. FLANAGAN
et al., Appellants.

A sale of land on execution, issued upon a void judgment against the owner, in no way affects his title, and a subsequent conveyance by him is just as effectual as if the judgment had never in form been entered. So also notice to the purchaser, when he took the conveyance, that another claimed title under the sale, does not operate as an estoppel against the former.

(Argued January 23, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Thomas J. McKee for appellants. The order of publication of the summons in *Cartan v. Kahle*, and of the sufficiency of the affidavit upon which the same was granted, cannot be questioned in this action. The judge granting the order being vested with jurisdiction to pass upon the sufficiency of the proof, if the proof was satisfactory to him the order cannot be impeached collaterally. (*Belmont v. Connen*, 82 N. Y. 259; *Carleton v. Carleton*, 85 id. 314; *Staples v. Fairchild*, 3 id. 46; *Cronter v. Cronter*, 133 id. 61; *Porter v. Purdy*, 29 id. 106.) The judgment of *Cartan v. Kahle*, under which the appellant claims title, cannot be attacked by the plaintiff (respondent) in this action. He was not a party to that action and no judgment can be attacked collaterally. (*Glacuis v. Fogel*, 88 N. Y. 440, 441; *Krekeler v. Ritter*, 62 id. 372; *Wottrich v. Freeman*, 71 id. 601; *White v. Merritt*, 7 id. 352; *Sheldon v. Wright*, 5 id. 497; *McCarthy v. Marsh*, Id. 263.) The respondent herein took title with full notice. All that

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was required to be done by the statute was performed. (Code of Pro. §§ 132, 231, 232.) The respondent herein should not be permitted at this late day to disturb the title of innocent parties, who by reason of his neglect will be put to great loss and damage. (*U. N. Bank v. Kuffer*, 63 N. Y. 618.) Admitting that the judgment of *Cartan v. Kahle* was void and can be attacked collaterally in this action, yet a person claiming under the conveyance by the sheriff by reason of the execution issued under that judgment would hold a title adverse to the defendant therein (Kahle), and a conveyance by Kahle after such sale and the deed thereunder would be void under the statute. (*Christie v. Gage*, 71 N. Y. 194; *F. Bank v. Merchant*, 13 How. Pr. 10; *De Silva v. Flynn*, 9 Civ. Pro. Rep. 429; *Crary v. Goodman*, 22 N. Y. 170; *Higinbotham v. Howard*, 72 id. 94; *Dowley v. Brown*, 79 id. 390; *Stoddard v. Whiting*, 46 id. 627; *Gross v. Welwood*, 90 id. 638; *C. L. Co. v. K. Co.*, 37 Hun, 12; *Livingston v. Proseus*, 2 Hill, 529; *Church v. Schoonmaker*, 42 Hun, 225; *Pearce v. Moore*, 114 N. Y. 259; *Hamilton v. Wright*, 37 id. 506.) If the sale under that judgment was invalid by reason of any jurisdictional defect in obtaining the judgment, then the plaintiff has no cause of action. This action under the last-mentioned state of facts can only be maintained in the name of the grantor of the plaintiff. (Code Civ. Pro. § 1501.) The grantee of land held adversely to his grantor cannot bring an action in his own name to recover the land from the occupant thereof. He must, under section 1501 of the Code of Civil Procedure, bring the action in the name of his grantor. (*Chamberlain v. Taylor*, 105 N. Y. 197; *Church v. Schoonmaker*, 42 Hun, 225; *De Silva v. Flynn*, 9 Civ. Pro. Rep. 426; *Smith v. Long*, 3 id. 408; 12 Abb. [N. C.] 122; *Livingston v. Proseus*, 2 Hill, 528; *Johnson v. Snell*, 34 N. Y. S. R. 177; *Hamilton v. Wright*, 37 N. Y. 506.)

Eugene S. Ives for respondent. Every grant of lands is absolutely void, if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming

under a title adverse to that of the grantor, but the possession must be actual, not constructive. (*Dawley v. Brown*, 79 N. Y. 390.) It cannot be claimed that there is evidence that the sheriff had actual possession of the premises two years after his deed under the judgment. The judgment and sale were absolutely void and the attachment and levy, if there were any, became void thirty days after the warrant was issued; for, by section 227 of the Code of Procedure, as amended by chapter 824 of the Laws of 1866, the action was never commenced. (*Kelly v. Countryman*, 15 Hun, 97.) For the same reason the *lis pendens* was of no avail at the time of the delivery of the deed from Kahle to the plaintiff. (Code of Pro. § 132.) The absence of anything to show that due diligence had been used, or would have been availing if used, is fatal to the sufficiency of the affidavit. (*Carleton v. Carleton*, 85 N. Y. 313.) In order that the affidavit may be upheld, it must be construed to contain some fact from which the judicial mind might determine that no amount of diligence would have been sufficient to enable the defendant to be found. There is nothing in the affidavit or in the order to show that a reasonable diligence would not have resulted in the personal service of the summons upon the defendant within this state. (*Bibby v. Smith*, 3 Hun, 60.)

EARL, J. This is an action of ejectment to recover certain land situated in the county of Westchester. The action has been twice tried. On the first trial there was judgment for the defendants, which was affirmed at the General Term. Upon further appeal to the Court of Appeals it was reversed and a new trial was granted. The action was again brought to trial before a judge without a jury and was submitted by both sides upon facts stipulated.

The plaintiff bases his title upon the following facts: Henry Kahle was seized in fee and possessed of the lands on the first day of December, 1867. On the 17th day of May, 1869, he conveyed the land to the plaintiff and Patrick McCracken. Patrick McCracken died leaving a will by

which he devised his interest in the land to the plaintiff, and thus the plaintiff claims to have become the sole owner of the land. The defendants base their claim of title to the land upon the following facts: In January, 1867, an action was commenced in the Supreme Court by Lawrence Cartan and others against Henry Kahle for the collection of a debt claimed to be due them from him. In that action a warrant of attachment was issued to the sheriff of Westchester county, who levied upon the land in question. At the same time notice of the pendency of the action and of the issuing of a warrant of attachment therein describing the land attached was filed in the office of the clerk of the county of Westchester. Kahle did not appear in that action. The summons was served upon him by publication and mailing, and not personally, without the state, in pursuance of an order granted upon an affidavit, copies of which affidavit and order are found in this record. In May, 1867, judgment was entered in the action against Kahle for upwards of \$1,100, and an execution was issued upon that judgment to the sheriff of Westchester county, and in pursuance thereof he sold the land to Lawrence Cartan on the 23d day of July, 1867, and filed his certificate of the sale in the office of the clerk of the county of Westchester on the 8th day of October, 1867. Thereafter the sheriff executed and delivered to Cartan his deed of the premises bearing date January 25th, 1869, and recorded in the office of the register of the county of Westchester on the 18th day of April, 1870. Afterwards Cartan, on the 17th day of July, 1871, conveyed the land to Edward A. Flanagan, and he entered upon and took possession of it. On the 27th day of November, 1871, Flanagan conveyed the land to the defendants in this action, who thereupon entered upon and took possession of it, and have since been in continued and undisputed possession thereof.

Upon the prior appeal to this court the case came to argument in the Second Division, and its opinion is to be found in 127 N. Y. 493. It was there held that the affidavit upon

which was granted the order of publication of the summons in the action of Cartan and others against Kahle, was insufficient to give the judge jurisdiction to make the order; that the judgment entered against Kahle by default, and the deed upon the sale of his property under that judgment were void, and that, therefore, the defendants in this action, claiming under that deed, had no title whatever to the land in dispute.

The facts upon the trial now under review are precisely the same as they were upon the first trial, and, therefore, the parties are concluded by the prior decision. The precise question as to the defendant's title was there decided which is now involved here. The court having held that the judgment was void, it had vitality for no purpose and could be assailed by any person who had an interest to assail it, or who could be affected by it. The judgment and the sale under it in no way affected Kahle's title, and his subsequent conveyance of the land was just as effectual as if the judgment had never in form been entered against him. We do not deem it proper to review the grounds of the former decision, and we rest our judgment thereon. It may be true that the plaintiff took his title to the land with notice of the claim of title made by the defendants and their grantors. But that notice does not operate as an estoppel against him. He found this land in the ownership, and, as we must assume, in the possession of Kahle, and knowing that the judgment and deed under which the defendants, claimed title were void, he had a right to take a conveyance of the land, and he thereby obtained a good title to it.

The further claim is made that the deed from Kahle to the plaintiff and his co-grantee was void because at the time of its execution the land was in the adverse possession of Cartan, the sheriff's grantee, who claimed title thereto. The difficulty with this contention is that there is nothing in the case to show that at the date of the deed under which the plaintiff claims, Cartan or any other person was in possession of the land, claiming to own the same. The record does not show that the land was in the actual possession of any one until more than

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two years after the deed, under which the plaintiff claims, was executed by Kahle.

We are, therefore, unable to see the least ground for this appeal, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ADALINE MATSON et al., Respondents, v. LOUISE J. ABBEY, as
Administratrix, etc., Appellant. *in 1864*

N M. procured a policy of insurance for \$2,000 upon the life of his son, payable to himself, his executors or assigns; he died leaving a will by which he gave all of his estate to his executors in trust during the life of his widow, the principal then to be divided among his children. The son died in 1866 and the policy was collected by the executors of the father's will. In 1869 the children and devisees of said testator executed an instrument under seal, by which they assigned all their interest in the moneys collected on the policy to plaintiffs, the widow and children of the son. The widow died in June, 1891. In July thereafter defendant was appointed the administratrix with the will annexed of M. In an action to recover the amount of the policy, it appeared that defendant as such administratrix received of the personal estate over \$8,000, and that there were no debts. Plaintiffs' claim was presented to defendant and payment thereof refused. This action was brought in November, 1891. *Held*, that the delivery of the assignment constituted a valid irrevocable gift of the fund realized upon the policy and vested title in the donees, subject to the life interest in the widow; that plaintiffs' cause of action matured at her death, and so, was not barred by the Statute of Limitations; and that the action, if not necessary, was at least proper and was not prematurely brought.

An award of costs against an executor or administrator, without a certificate of the trial judge showing the facts upon which such an award must be based, is error. (Code Civ. Pro. §§ 1835, 1836.)

Reported below, 70 Hun, 475.

(Argued January 23, 1894; decided January 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 8, 1893, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Circuit without a jury.

This action was brought to recover \$2,000, the amount of a policy of insurance upon the life of Austin Matson, Jr., with interest.

The policy was procured by the father of the insured and was payable to him, his executors or assigns. He died December 1, 1864, and by his will devised and bequeathed the whole of his estate to his executors in trust, and directed them to apply the rents and income to the support of his widow and his daughter Emily during life or until the death of the widow, the principal then to be divided between his children. He also directed that the yearly premium on said policy should be paid by his executors in case the insured did not pay it, such payments to be charged as advancements upon his share. The son died February 19, 1866, and the policy was thereupon collected by the executors of the father.

The widow of the testator died June 15, 1891, and defendant was, on July 13, 1891, appointed administratrix with the will annexed. On January 27, 1869, the children and devisees of Austin Matson, Sr., by a sealed conveyance, assigned all their interest in the moneys collected on the policy aforesaid to the plaintiffs, the widow and children of Austin Matson, Jr. It was shown on the trial that defendant, as administratrix, received of personal estate \$8,534.26, and no debts against the estate were alleged or proven. Prior to the commencement of this action a demand was made by the plaintiffs from defendant for the sum of \$2,000 out of the estate of Austin Matson, Sr., so assigned to the plaintiffs, and payment was refused.

Further facts are stated in the opinion.

A. T. Clearwater for appellant. No consideration is proven for the assignment, nor is any claimed to have passed. Upon the contrary, it was a mere intended gift of the money to the plaintiffs, who at that time were infants and destitute. The money was never delivered, the consent to give was revoked before consummation and the transaction fails. (*Wadd v. Hazleton*, 137 N. Y. 215; *Beaver v. Beaver*, 117

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id. 421; 137 id. 59; *F. N. Bank v. Clark*, 134 id. 368; *Williams v. Guile*, 117 id. 343; *In re Crawford*, 113 id. 560; *Jackson v. T. T. S. R. Co.*, 88 id. 520; *Young v. Young*, 80 id. 438; *Harris v. Clark*, 3 id. 93-112; *Gray v. Gray*, 47 id. 552; *Robinson v. Ring*, 71 Maine, 140; *Scott v. B. S. Bank*, 140 Mass. 157; *Pope v. B. S. Bank*, 56 Vt. 234; *Walker v. Walsh*, 11 N. E. Rep. 727; *Bennett v. Coke*, 28 S. C. 353; *Gerry v. Home*, 130 Mass. 350.) The intended gift to the plaintiffs was a conditional one. (*Meigs v. Meigs*, 15 Hun, 453; *Beaver v. Beaver*, 53 id. 228; 117 N. Y. 421; 62 Hun, 194; 137 N. Y. 59; *Wadd v. Hazleton*, Id. 215; *Crawford v. Crawford*, 113 id. 560.) There was no trust. (*Young v. Young*, 80 N. Y. 430.) The contention of the plaintiffs that there was an executed gift is fatal to their right of recovery. If the contention be true the claim is barred by the Statute of Limitations. (Code Civ. Pro. §§ 382, 388; *Mills v. Mills*, 115 N. Y. 80; *Diefenthaler v. Mayor, etc.*, 111 id. 331; *Storey v. Graham*, 14 id. 492; *Compton v. Elliot*, 16 J. & S. 211; *Bell v. Morrison*, 1 Pet. 360; *U. S. v. Wiley*, 11 Wall. 508, 513; *Spring v. Gray*, 5 Mass. 523; *Philip v. Pope*, 10 B. Mon. 163; *McCarthy v. White*, 21 Cal. 495; *Dickenson v. McCumy*, 5 Ga. 486; *McClung v. Silliman*, 3 Pet. 270; *Gautier v. Franklin*, 1 Tex. 732; *Gorman v. Judge of Newaggo Circuit*, 27 Mich. 138; *Roberts v. Pillow*, Hempst. 624; *U. S. v. Wilder*, 13 Wall. 251; *Teackle v. Gibson*, 8 Md. 70; *Crocker v. Clemen*, 23 Ala. 296; *Platt v. Northam*, 5 Mass. 95; *Bailey v. Carter*, 7 Ired. [N. C. Eq.] 282; *Hovend v. Lord Anesley*, 2 Sch. & Lef. 607, 629; *Wilhelm v. Caylor*, 23 Md. 151; *Ayer v. Stuart*, 14 Minn. 97; *Dodge v. E. Ins. Co.*, 12 Gray, 765; *Longworth v. Hunt*, 11 Ohio, 194-201; *Carrol v. Green*, 92 U. S. [2 Otto] 509; 2 Story's Eq. Juris. § 1520; *Harris v. Saunders*, 4 B. & C. 411; *Beatty v. Burns*, 8 Cranch, 98; *Chiveley v. Bond*, 4 Med. 105; *Haven v. Foster*, 9 Pic. 112; *Williams v. Williams*, 5 Ohio, 104; *Askeo v. Hooper*, 28 Ala. 634; *Palmer v. Maione*, 1 Heisk. 549; *New Albany v. Burke*, 11 Wall. 96; *Badger v. Badger*, 2 Cliff. [C.

C.] 137.) The action is prematurely brought. (Code Civ. Pro. § 1819; *In re Van Dyke*, 44 Hun, 394; *In re Clayton*, 17 C. P. 75.) The plaintiffs were permitted to testify as to conversations had by them with their deceased grandmother, Maria T. Matson, the executrix of the elder Matson, and swore that she said to them she wanted to pay this money over and was willing to do so. The evidence was clearly inadmissible and incompetent. (Code Civ. Pro. § 829; *Devlin v. G. S. Bank*, 125 N. Y. 756; *In re Eysaman*, 113 id. 63; *Leutchfad v. Lord*, 132 id. 465; *Heyne v. Doerfler*, 124 id. 505; *Holcomb v. Holcomb*, 95 id. 316; *Lane v. Lane*, Id. 494; *In re Smith*, Id. 516; *In re Dunham*, 121 id. 575.) Any illegal evidence received under objection cannot be considered harmless, and the error be disregarded upon appeal. (*Anderson v. R., W. & O. R. R. Co.*, 24 N. Y. 334; *O'Hogan v. Dillon*, 76 id. 170; *Williams v. Fitch*, 18 id. 546.) Costs should not have been allowed to the plaintiffs. (*Chesbro v. Hicks*, 66 How. Pr. 194; *Buckhout v. Hurt*, 16 id. 407; *Pronde v. Whiten*, 15 id. 304; *Stevenson v. Clark*, 12 id. 282.)

Martin I. Townsend for respondent. The instruments in question were executed to settle a claim presented and urged by the wife and children of Austin Matson, Jr., and the assignments in due form must be treated as assignments executed to settle a controversy; and the settlement of that controversy is a good, sufficient and valuable consideration. (*White v. Hoyt*, 73 N. Y. 514; *Wehrune v. Kirhn*, 61 id. 623; *Stewart v. Ahrenfeldt*, 4 Den. 187.) If it should be held that the instruments of December 30, 1867, and January 27, 1869, were mere instruments of gift, they were valid. (*Loverly v. Stewart*, 25 N. Y. 239; *Crawford v. Dox*, 5 Hun, 507; *Fulton v. Fulton*, 48 Barb. 581; *Harris v. Clark*, 3 N. Y. 93; *Ridden v. Thrall*, 125 id. 572; *Beaver v. Beaver*, 117 id. 421; *Cooper v. Burr*, 44 Barb. 9; *Pink v. Church*, 120 N. Y. 634; *Spencer v. Carr*, 45 id. 406.) No Statute of Limitations has run upon the claim on which this action was brought. (*Feltz v. Schultus*, 46 N. Y. S. R. 216.) It is

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alleged that the plaintiffs have not only delayed too long before coming into court, and have thus lost their claim, but have come into court too soon after all, and so have no standing here. This claim is unsustainable. (*In re Burling*, 5 Dem. 48; *In re Watson*, 64 Hun, 369; *In re Wiley*, 119 N. Y. 642; Code Civ. Pro. §§ 1822, 2743.) The incidents provided for in the statutes in regard to presenting claims, and having claims passed upon and allowed or rejected, and in regard to bringing suits, in which the law carefully guards the estate from unnecessary litigation and costs have no relation to us. (Code Civ. Pro. § 3246.) The appellant in this case is in no position to argue the question whether costs were originally properly adjusted by the court in which the case was tried. (*Bush v. Remsen*, 34 N. Y. 384; *In re Glover*, 83 id. 611.) All the findings of facts are fully sustained by the evidence, both that which is oral, and by the documents which the court had before it. The conclusions of law were inevitable from the proven facts. The exceptions to these conclusions, under such circumstances, are not available. (*Daniels v. Smith*, 130 N. Y. 696.)

FINCH, J. We adopt the opinion of the General Term upon the main questions involved in this appeal, deeming it unnecessary to repeat the reasons very fully and correctly assigned. That court held that there was a valid gift of the right to the fund realized upon the life policy by force of the delivery of the assignment or deed of gift: that it could not be revoked, but vested in the donees subject to the life interest of the widow: that the cause of action matured at her death, and so was not barred by the Statute of Limitations; and that the action, if not necessary, was at least proper and not prematurely brought. We concur in those conclusions which settle in favor of the plaintiffs the substantial points of the controversy.

But there is a minor question relating to the award of costs against the administratrix which, we think, was wrongly decided. Such costs were awarded without any certificate or

finding of the trial judge showing the facts upon which the award was founded. The Code (§ 1835) forbids the allowance of costs in an action brought against an executor or administrator in his representative capacity except as prescribed in the next section. That permits such an award where it appears that the claim was duly presented, that its payment was unreasonably resisted or rejected, or that there was a refusal to refer. Since these facts in whole or in part depend upon circumstances outside of the litigation and not within its issues, the section further provides that the facts must be certified by the judge or referee before whom the trial was had. Such a certificate is, therefore, the necessary basis of the award, and without it the facts cannot fully appear. The evidence on the trial and its result may be taken into account, but cannot serve without the prescribed certificate. That was asserted as the correct rule of practice in *Wray v. Halliday* (3 Month. L. Bul. 98), and we concur in the opinion. The obvious purposes of the two sections of the Code referred to can only be fully accomplished in that way.

The judgment rendered by the trial court should, therefore, be modified by striking out the award of costs in the trial court, and as modified should be affirmed, with costs to the plaintiffs in this court. The costs awarded on appeal to the General Term we do not disturb.

All concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
LUCIUS R. WILSON, Appellant.

It is competent for the court, on a criminal trial, on its own motion, to strike out improper evidence and instruct the jury to disregard it, and it will be assumed on appeal that the instructions were obeyed, and so, the reception of the evidence is not a ground for reversal on appeal.

Where the judge in charging the jury on such a trial lays down an erroneous proposition, but upon his attention being called thereto by objection, corrects the misdirection and lays down the proper rule, no error is presented for review

Upon the trial of an indictment for murder in killing H., a police detective, who had the defendants under arrest at the time of the homicide, the prosecution was allowed to prove that previous to the homicide a burglary had been committed, also, to prove facts and circumstances tending to show that H., when he made the arrest, had reasonable grounds to believe defendants had committed that crime. *Held*, no error; that the evidence was competent as showing that H. was justified in making the arrest without a warrant (Code Crim. Pro. § 177, subd. 3.)

L. and C. were jointly indicted, they demanded separate trials. On the trial of L. the evidence for the prosecution showed these facts: On the day of the homicide the defendants entered a restaurant; a burglary had been previously committed, as they passed the bar a waiter said in their hearing: "There goes the burglars." The proprietor of the restaurant telephoned to police headquarters, and in a few minutes H. came; he followed defendants as they went out on the street, tapped them on the shoulders, and, after stopping in a doorway, apparently in conversation, for a short time, proceeded with them toward the police station. Being compelled to turn out into the street because of an obstruction on the sidewalk, H. took each prisoner by the arm. After proceeding a short distance, C., exclaiming "let her go," drew his revolver, seized H., drew him around and struck him on the head with the weapon. L. broke away from the grasp of H., and, when eight or ten feet distant, turned and deliberately shot him through the head, killing him instantly. *Held*, that a verdict of murder in the first degree was justified.

When L. was arrested it appeared that he had two revolvers, both of which were loaded, he was found secreted under a stoop; he had had abundant opportunity to re-load, and there was testimony tending to show he was engaged in that act when crossing a bridge after the shooting, and when arrested, cartridges, fitting both of his revolvers, were found upon his person. *Held*, the fact that the revolvers were found loaded was not material.

141	185
147	527
141	185
154	867
141	185
159	66
141	185
164	469

It seems that, conceding the arrest by H. was unlawful, this did not justify or affect the character of the homicide.

(Argued January 16, 1894; decided February 6, 1894.)

APPEAL from judgment of the Court of Oyer and Terminer of Onondaga county, entered upon a verdict rendered November 5, 1893, convicting defendant of the crime of murder in the first degree and from an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

Harrison Hoyt for appellant. Evidence tending to prove other criminal acts upon the part of the accused, in order to support the probabilities of the evidence that he committed the particular act charged, is incompetent. (*People v. Gibson*, 21 N. Y. S. R. 59; *People v. Grapo*, 76 N. Y. 291; *People v. Sharp*, 107 id. 460, 461; *Smith v. Shoemaker*, 17 Wall. 630, 639; *Deery v. Cray*, 5 id. 795; *Moore v. Nat. Bank*, 104 U. S. 625; *Gilman v. Higby*, 110 id. 50; *V. R. R. Co. v. O'Brien*, 119 id. 103; *People v. Greenwall*, 108 N. Y. 302; *Copperman v. People*, 56 id. 593; *Corbin v. People*, Id. 363.) The exceptions to the evidence of James Sheppard were well taken in regard to the conversations between Sheppard and deceased. (*Russell v. Allerton*, 29 N. Y. S. R. 169; *Reynolds v. Roosevelt*, 30 id. 369.) Illegal evidence tending to excite the passions, arouse the prejudices, awaken the sympathies or influence the judgment of the jurors in any way may not be considered harmless. (*Smith v. Shoemaker*, 17 Wall. 630, 639; *Deery v. Cray*, 5 id. 795; *Moore v. N. Bank*, 104 U. S. 625; *Gilman v. Higby*, 110 id. 50; *V. R. R. Co. v. O'Brien*, 119 id. 103.) The pretended arrest of the defendant was illegal and unwarranted and the trial judge should have so instructed the jury. (Code Crim. Pro. §§ 165, 177.) It was error for the court to refuse the defendant's motion, at the close of the People's case, to strike out the evidence tending to prove defendant guilty of the McBride burglary. (*Furst v. S. A. R. R. Co.*, 72 N. Y. 542; *Gall v. Gall*, 114 id. 109; *People v. Smith*, 104 id.

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491; *Lindsay v. People*, 63 id. 143; *Arthur v. Griswold*, 55 id. 400; *Coleman v. People*, 58 id. 555.) If the defendant was not under legal arrest, then he was not committing a felony in regaining his liberty; and, consequently, was not guilty of murder unless he, with premeditation and deliberation, actually killed the officer. (Whart. Crim. Law [8th ed.], § 648; Code Crim. Pro. § 180.) It was error to refuse to dismiss the first count in the indictment. It charged the crime of murder in two forms, in a different manner and by different means. (Code Crim. Pro. §§ 276, 278.)

B. J. Shove for respondent. The defendant was in the lawful custody of deceased. (Code Crim. Pro. § 177; *Burns v. Erben*, 40 N. Y. 463, 470; *Holly v. Mix*, 3 Wend. 850; *In re Henry*, 29 How. Pr. 187; *Carpenter v. Mills*, Id. 474; 1 Bish. Crim. Pro. § 181.) The evidence of all the facts and circumstances upon which deceased made the arrest was competent and proper. (*People v. Osmond*, 138 N. Y. 80; *People v. Giblin*, 115 id. 196; *People v. Conroy*, 97 id. 62; *People v. Willett*, 102 id. 254; *People v. Cox*, 80 id. 500; *People v. Fitzgerald*, 37 id. 413; *People v. Kennedy*, 39 id. 245; *People v. Enoch*, 13 Wend. 159; *People v. Johnson*, 110 N. Y. 134.) The evidence that defendant was under lawful arrest was sufficient. (1 Bish. Crim. Pro. § 182; *Comm. v. Brooks*, 61 Penn. St. 352.) The evidence that deceased notified defendant of his authority and the cause of his arrest, in accordance with section 180 of the Code of Criminal Procedure, was circumstantial, but very convincing, and certainly sufficient for the jury to find such notice was given. (2 Roscoe's Crim. Ev. [8th ed.] 990.) The evidence of Jacob Nann, that on the afternoon after the McBride burglary the defendant paid for the meal in Palmer's restaurant in dimes, nickles and quarters was competent. (1 Russell on Crimes [9th Am. ed.], 799, 800; *People v. Harris*, 135 N. Y. 450; *People v. Johnson*, 139 id. 358.) The verdict was fully sustained by the evidence. (Penal Code, §§ 29, 82, 85, 183, subd. 3; *People v. Johnson*, 110 N. Y. 134; *Cox v. People*, 80 id. 500; *People*

v. *Greenwall*, 115 id. 520; *People v. Giblin*, Id. 196; *Ruloff v. People*, 45 id. 216; *People v. Carlton*, 115 id. 623; *People v. Conroy*, 97 id. 62; *People v. Kiernan*, 101 id. 618; *People v. Beckwith*, 103 id. 360; *Comm. v. Brooks*, 61 Penn. St. 352; *Galvin v. State*, 6 Cold. [Tenn.] 283; *Raf-ferty v. People*, 72 Ill. 37; 3 Greenl. on Ev. §§ 123, 145; 1 East P. C. 328; Allison's Prin. Cr. Law of Scotland, 25; 1 Hume, 250; Roscoe's Crim. Ev. 707, 708; 1 Russell on Crimes, 834; 2 Roscoe's Crim. Ev. 983, 987; Foster, 137, 138; 2 Bish. Crim. Law, § 699.)

BARTLETT, J. This is an appeal from the judgment of the Court of Oyer and Terminer of Onondaga county, and from an order denying a new trial on the conviction of the defendant of murder in the first degree. The defendant was jointly indicted with one Charles Wilson for killing James Harvey by shooting him with a revolver, at the city of Syracuse, on the 31st day of July, 1893.

The defendants, on being arraigned, demanded separate trials. The murdered man, James Harvey, was a police detective of the city of Syracuse, about sixty years of age; had been a member of the police force twenty-four years, and a detective eighteen years.

Before examining that portion of the case relating to the homicide on the 31st day of July, 1893, it is necessary to consider a number of preliminary objections raised by the learned counsel for the defendant to portions of the district attorney's opening address to the jury, and to evidence introduced in pursuance thereof. It will be convenient to group these objections and consider them together, as well, also, the exception of defendant's counsel at the end of the People's case, when the court refused, on his motion, to strike out said evidence. The district attorney's declared intention in his opening address, and the evidence by which it was followed up, was substantially this, viz.: That on the night of June 5th, 1893, the shoe store of McBride & Co., on South Salina street, in the city of Syracuse, was entered

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by burglars, and several hundred dollars' worth of property and some money carried away; that the defendants in this indictment, and a third person, all of them strangers in the city of Syracuse, for two or three days prior to the burglary, and on the day succeeding it, had taken meals at Palmer's restaurant on Warren street in said city; that Palmer and his head waiter were led to suspect that these persons were connected with the burglary at McBride & Co.'s store, and they communicated their suspicions to the officers at police headquarters, the strangers having in the meantime disappeared; that Palmer was instructed by the police authorities that if the suspected persons should at any time appear in his restaurant, he was to telephone the fact to headquarters; that a day or two after the burglary, the chief of detectives told the deceased of the burglary; of the persons resting under suspicion; of the arrangements made with Palmer to telephone headquarters if the suspected persons should appear again in his restaurant, and thereupon instructed the deceased that, if he received such a message from Palmer, he should go over and arrest the persons pointed out to him and bring them to headquarters.

The indefatigable and able counsel for the defendant, by numerous objections, opposed the offering of this evidence in its entirety and in detail. He strenuously insisted that it was fatal error for the court to admit this evidence, and urged with great earnestness and ability that it was an attempt to prove a crime not alleged in the indictment, and was calculated to greatly prejudice the minds of the jury. He also insisted that it was error to permit Chief Detective James Sheppard to testify as to the information conveyed and instructions given to Detective Harvey, the deceased, when he came on duty a day or two after the burglary; it was urged that this was permitting the declarations of outside parties and the proof of conversations at which the defendant was not present.

When the counsel for the defendant, at the close of the People's case, moved to strike all this evidence from the

record, the remarks of the court, in denying this motion, furnish the obvious answer to these objections. The trial judge said: "The evidence was not received, so stated at the time, for the purpose of showing the fact that this defendant committed the burglary, but for the purpose of showing that a felony was committed, and that certain facts, whether true or otherwise, were brought to the knowledge of Detective Harvey, tending to show that he had reasonable ground, or cause, if it has that tendency, for making the arrest, if he did make the arrest, all of which are questions for the jury, of the defendant here; and the evidence is admitted in the case and allowed to stand for no other purpose."

The district attorney was equally explicit in his declarations as to the object of this line of proof. He said: "The purpose of it is to justify the officer; to show, in accordance with the provision of the Code, that a felony had been committed, and that he had reasonable cause to believe that the defendant had committed it, and that the persons arrested had committed it." The counsel for the defendant asked the district attorney if he intended to prove the burglary, and the reply was: "Certainly I propose to prove it was committed."

Then defendant's counsel asked, "And to trace it to this defendant?" The district attorney replied, "Not at all." This was certainly as favorable a limitation of the proofs as the defendant could ask and we do not wish to be understood as approving it.

At the close of the case the court, of its own motion, struck out a portion of the evidence thus objected to, making this statement, viz.: "The only evidence that is allowed to stand is the evidence tending to establish the facts of the burglary and the statements and circumstances which came to Chief Harvey, which tend to show that, and has that tendency, that he had probable cause for making the arrest — that may stand in the case; that you will consider. But any evidence, as I stated before, tending to show that this defendant, or any other party, was guilty of this burglary, is stricken from the case and you must give it no consideration."

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This instruction to disregard the evidence stricken out was repeated by the trial judge in his charge to the jury.

We are of opinion that it was competent for the court, on its own motion, to strike out this evidence and instruct the jury to disregard it, and it will be assumed the instructions were obeyed. (*Greenfield v. The People*, 85 N. Y. 75, 90, 91.)

The rule is also well settled that where a judge in charging the jury, lays down erroneous propositions, but, upon his attention being called thereto by objection, corrects the misdirection and lays down a proper rule, no error is presented for review. (*Eggler v. The People*, 56 N. Y. 642; *Greenfield v. The People*, 85 N. Y. at page 90 and cases cited.) This rule involves the same principle invoked by the trial judge in case at bar. We think sufficient evidence was left in the record, after this action of the trial judge, to justify submitting to the jury the question whether Detective Harvey, a felony having been committed, had reasonable cause for believing the persons to be arrested had committed it and was justified, as a peace officer, in making the arrest without a warrant.

We also are of opinion that the trial judge, was not called upon to strike any of this evidence from the record, as it was all competent to be submitted to the jury on the question whether Detective Harvey was justified in arresting the defendants in this indictment without a warrant.

We, however, go still further and hold that if this evidence had been offered generally in the cause, and without limitation, it would have been perfectly competent as bearing both upon the action of Harvey in making the arrest and the understanding of defendant that he was taken into custody upon a charge of felony.

The right to arrest without a warrant existed at common law, and is now authorized by the Code of Criminal Procedure (§ 177).

If the evidence remaining in the case satisfied the jury that the arrest of the defendants in this indictment was lawful

without a warrant, it also had a most important bearing on the main branch of the case, which will now be considered.

On the day of the homicide, July 31st, 1893, the defendants in this indictment entered Palmer's restaurant, between nine and ten o'clock in the morning, and ordered breakfast. Daniel W. Savage, the head waiter, testified that at the time, he and Palmer were standing behind the bar, and as the defendants passed them, and when not more than six feet distant, he (Savage) remarked to Palmer: "There goes the burglars." He further swore that he spoke in as loud a tone of voice as employed by him while on the witness stand.

It was for the jury to decide, under this state of the proofs, whether the defendants heard this remark, and were thus early advised that they rested under suspicion.

The proof is that Palmer at once telephoned police headquarters, and that in about ten minutes Detective Harvey appeared upon the scene. It is at this point of the case that the materiality and importance of the evidence of the burglary, and the other facts already referred to, become apparent.

It seems that Palmer requested Harvey not to make the arrest in his place, and the officer, therefore, waited until the defendants in this indictment came out on Warren street and walked north on the east side of that street. Detective Harvey having had the defendants identified, followed them, and while they were still on Warren street tapped them on the shoulders, and the three stepped into the doorway of an adjacent store, where they appeared to be engaged in a short and quiet conversation, of from one to three minutes, according to the evidence. They then started off, with the deceased between the defendants and about six inches in the rear, and proceeded northward on Warren street to Water street, and turned eastward on the south side of the latter street.

It is important to bear in mind that this was the direct route to the police station.

It was, therefore, peculiarly the province of the jury to determine whether, in view of the evidence of the burglary and the other proofs connected with it, which the trial judge

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allowed to remain in the case, the remark of Savage when the defendants entered the restaurant the day of the homicide, the interview between Harvey and the defendants in the doorway after they left the restaurant, and the fact that they proceeded with him quietly, apparently turning into East Water street of their own motion toward the police station, and in advance of the officer, the defendants were not in the lawful custody of Harvey as a peace officer authorized to arrest without warrant.

At the time Harvey and his prisoners turned into Water street going east towards the police station he had not taken hold of either of them. As they approached a barricade across the sidewalk in front of a new building on East Water street, they were compelled to turn out into the street and at this point Harvey took each prisoner by the arm as they were passing the obstruction; and at the further side of the barricade, at the point where they were about to return to the sidewalk, the fatal affray took place.

The defendant Lucius R. Wilson is somewhat taller and heavier than the other defendant, Charles Wilson, and wore on this occasion a dark derby hat, and Charles Wilson a light straw hat. When Harvey was thus walking between his prisoners, having hold of the arm of each, Lucius R. Wilson was on his left side and Charles Wilson on his right.

The facts relating to the shooting have been found by the jury on a conflict of evidence. The witnesses for the People establish substantially the following facts, viz.:

As the two prisoners and the deceased reached the north-east corner of the barricade, Charles Wilson exclaimed "let her go," drew his revolver and seizing Harvey pulled him around striking him on the head with the butt end of his weapon. In the meantime Lucius R. Wilson broke away from Harvey's grasp and moving off to a distance of eight or ten feet turned, and as the deceased stood in the street facing him, and apparently dazed from the blow dealt him by Charles Wilson, deliberately raised his revolver and shot him through the head, killing him instantly.

The two prisoners then fled over the Warren street bridge followed by a number of bystanders, and the defendant in this appeal was in a short time captured and locked up.

The defense swore several witnesses whose testimony tended to prove that the shooting was done by Charles Wilson, who wore the light straw hat. The preponderance of evidence was with the People, and the question as to who did the shooting was properly submitted to the jury. We think no injustice has been done the defendant, as the verdict is supported by abundant evidence. (*People v. Tice*, 131 N. Y. 651.) This disposes of the main point presented by the learned counsel for the defendant, that the evidence is insufficient to sustain the verdict of the jury.

There are several other points which merit special attention under the rule that this court will consider any fact in the prisoner's favor, even if not presented by exception.

The counsel for the defendant insists that it was improper to bring into court during the trial the other defendant in this indictment, Charles Wilson, and allow him to be repeatedly identified by various witnesses.

It is beyond dispute that these defendants were both present at the time of the homicide, and it is quite possible the ends of justice were subserved by the presence of Charles Wilson in the court room. We are of opinion that this matter was wholly within the discretion of the trial judge, and that the convicted defendant was in no wise prejudiced by this procedure.

The defendant's counsel called our attention on the argument to the fact that when the defendant in this appeal was arrested, and a bystander accused him of the murder, he urged that both his revolvers were loaded, and which proved to be true.

The fact is that the defendant was found, when arrested, secreted under the stoop of a house back in the yard from the street, and abundant opportunity was afforded him to re-load his revolver.

There is some evidence in the case tending to show that he was engaged in that act when crossing the Warren street bridge after the shooting of deceased.

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It is also proved that the defendant was searched immediately after his arrest, and a quantity of cartridges fitting both of his revolvers were found upon his person.

In view of all these circumstances, we are not inclined to give weight to the fact that defendant's revolvers were loaded at the time of his arrest.

In reading the charge of the learned trial judge we have been impressed with its great fairness towards the prisoner; but we feel constrained to say that there was no evidence in this case tending to show that these defendants were in danger of bodily harm, or injury, at the hands of Detective Harvey, while he had them under arrest; on the contrary, the evidence is uncontradicted that he was conducting these defendants to the station house in a kindly and considerate manner that should have exposed him to no violence.

There was an abundance of evidence to go to the jury as to this arrest being lawful, and the jury were justified in so finding; but if, by way of argument, it be treated as an illegal arrest, the defendant was not justified in slaying James Harvey. It was a ruthless assassination.

There are a large number of exceptions in the case which relate to the questions we have already ruled upon.

If there are others not specially mentioned, it is not to be inferred that we have failed to examine them.

The case comes here on a voluminous record, and in the discharge of the duty imposed upon us, to review the facts in every capital case, and to determine whether, upon all the evidence, there is, in our opinion, good and sufficient reason for setting aside the verdict of the jury and granting a new trial, we have examined this record with the greatest care, both as to the facts and the law, and have reached the conclusion that the conviction must be affirmed.

The judgment of conviction and the order denying a new trial, are affirmed.

All concur.

Judgment affirmed.

141	196
161	204

THE PEOPLE ex rel. THE SECOND AVENUE RAILROAD COMPANY,
Respondent, v. EDWARD P. BARKER et al., as Commissioners
of Taxes, etc., Appellants.

In the assessment of taxes upon a corporation under the act of 1857 (§ 3, chap. 456, Laws of 1857), it is entitled to have its indebtedness deducted from the value of its corporate assets.

(Argued January 22, 1894; decided February 6, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 9, 1893, which affirmed an order of Special Term setting aside an assessment for taxation upon the relator's capital stock.

The facts, so far as material, are set forth in the opinion.

David J. Dean for appellants. The commissioners were justified in their determination that the aggregate value of the capital stock after deducting the assessed value of the real estate of the corporation, equaled the assessment made. (*U. T. Co. Case*, 126 N. Y. 433; *People ex rel. v. Coleman*, 107 id. 543; 126 id. 433; *People v. R., W. & O. R. R. Co.*, 105 id. 201; *People ex rel. v. Comr. of Taxes*, 95 id. 554; *People ex rel. v. Barker*, 139 id. 55.)

Chas. E. Miller for respondent. In ascertaining the amount to be assessed, the indebtedness is to be deducted from the gross assets. (*People v. Ferguson*, 38 N. Y. 89; *People v. Comrs.*, 36 How. Pr. 315; *People v. Comrs.*, 31 Hun, 32; *People v. Asten*, 100 N. Y. 597, 612; *People v. Coleman*, 107 id. 541; 126 id. 433; Laws of 1885, chap. 411, § 4; Laws of 1892, chap. 202, § 4; Laws of 1857, chaps. 456, 536, § 3; *People v. Comrs.* 23 N. Y. 242; *La Farge v. E. F. Ins. Co.*, 22 id. 352; *B. Co. v. Tax Comrs.*, 1 Keyes, 303; *People v. McLean*, 80 N. Y. 254.) The fact that in the long history of litigation on the subject of taxation no such claim as is now advanced by appellants has ever been made, and that

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repeated dicta by the courts and the uniform action of assessing officers throughout the state have assumed that the indebtedness should be deducted is conclusive against the ground taken by appellants. (*People v. Comr. of Taxes*, 6 Hun, 109, 114; *Easton v. Pickersgill*, 55 N. Y. 310; 64 id. 656.) The indebtedness is to be deducted from the taxable property of the corporation. (*People v. Ryan*, 88 N. Y. 142; *Laws of 1885*, chap. 411, § 4.)

BARTLETT, J. The relators were assessed for the purpose of taxation upon capital stock for the year 1892, in the sum of \$968,973. In July, 1892, they sued out a writ of certiorari to review the proceedings of the tax commissioners.

The special term of the Supreme Court reversed the adjudication of the tax commissioners and vacated the assessment. The general term, in affirming this order, considered at length the question whether, as a matter of law, the debts of the relator were necessarily deductible from the value of the corporate assets. We are satisfied with its conclusions on that point and will not consider the question at length on this appeal. The respondent company was entitled to have its indebtedness deducted from the value of its corporate assets which constituted its capital stock, or capital, as distinguished from its actual share stock. The rule has been repeatedly recognized by this court. (*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433; *People ex rel. Edison Electric Illuminating Co. v. Barker*, 139 id. 55.) In this last case Judge PECKHAM remarks, at page 63, after considering the indebtedness of the corporation, as follows, viz.:

"This indebtedness must, in the nature of things, be taken into consideration in arriving at the value of the capital of the relator. And when it is seen that the indebtedness of a corporation is double the amount of all its assets, it follows, upon the system adopted by the state for the assessment of corporations, that the actual value of the capital of such a corporation is zero."

The case at bar presented a similar situation. According

to the statement furnished by the relators to the commissioners, the following state of affairs was disclosed, viz.:

Real estate, assessed value.....	\$531,027.00
Personal property.....	590,269.12
Total.....	<u>\$1,121,296.12</u>
Liabilities	<u>1,938,873.65</u>
Excess of liabilities.....	<u><u>\$817,577.52</u></u>

The commissioners made up a statement as follows, viz.:

Personal property.....	\$1,500,000
Assessed value of realty	531,027
Amount subject to tax.....	<u><u>\$968,973</u></u>

It is not contended on the part of the commissioners that they deducted the indebtedness.

It is, therefore, of no importance which statement is taken as a basis of computation.

Taking the figures of the commissioners, by which they are certainly concluded, and deduct from the amount of \$968,973, they find subject to taxation, the indebtedness of the company of \$1,938,873.65, and it is apparent that there is no capital subject to taxation, and the assessment in this case is illegal and must be set aside.

The orders of the special and general terms are, therefore, affirmed.

All concur.

Orders affirmed.

BENJAMIN WEEKS, Appellant, v. JAMES O'BRIEN, as Executor,
etc., Respondent.

Where a building contract contains a condition requiring an architect's certificate of completion of the contract, before payment of the last installment, it is essential, in an action upon the contract to recover that installment, to allege in the complaint performance of that condition, or set forth facts excusing plaintiff from procuring the certificate

In order to avail himself of the objection the defendant is not required to present it by demurrer or answer; he may raise it on the trial. (Code Civ. Pro. § 499.)

In an action upon such a contract a copy thereof was annexed to the complaint, which alleged performance, stated the amount unpaid and demanded judgment therefor. The answer denied the complaint and set out as a counterclaim that plaintiff abandoned the contract before completion and that defendant, after due notice under a provision of the contract, authorizing him in such case so to do, completed the building in accordance with the stipulations, at a cost specified, and also had sustained damages by reason of the delay. On the trial plaintiff testified, in detail, as to what he had done under the contract, and proof was given of demand upon the architect for a certificate, which was refused. Defendant claimed a failure to perform the contract in several particulars, and upon cross-examination of plaintiff called out the fact that notice had been served on him under the contract and that defendant had proceeded thereunder to complete the work. At the close of plaintiff's evidence the court dismissed the complaint on the ground that it contained no averment that the architect unreasonably refused a certificate of the completion of the work. *Held*, error; that while it was not too late to then raise the objection, and no application having been made to amend the complaint, it was in the discretion of the court to entertain it, yet, by calling out the testimony that defendant had, after notice, proceeded to complete the contract, this opened the issue, and as the provision of the contract under which defendant acted, entitled plaintiff to recover the difference between the last installment and the amount expended by defendant in completing the work, this rendered the certificate unnecessary, and the case should have gone to the jury upon the issue so litigated.

(Argued January 25, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 8, 1891, which affirmed a judgment in favor of defend-

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ant entered upon a decision of the court dismissing the complaint on trial at Circuit.

This action was brought to recover the last installment under a building contract entered into by plaintiff with Ellen O'Brien, defendant's testatrix.

The contract provided for the payment of the contract price in specified installments from time to time as the work progressed; the last installment upon its completion "provided a certificate shall be obtained" from the architect. The contract also contained this provision: "*Fourth.* Should the contractor, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract."

The facts, so far as material, are stated in the opinion.

Brainard Tolles for appellant. The trial judge was not justified by any technicality of pleading in refusing to submit to the jury the substantial controversy between the parties appearing without objection upon the face of the evidence. (*Brehm v. Mayor, etc.*, 104 N. Y. 186; *Dunn v. Durant*, 9 Daly, 389; *Southwick v. F. N. Bank*, 84 N. Y. 420; *Oakley v. Morton*, 11 id. 25; *Hosley v. Black*, 28 id. 443; *McKnight v. Devlin*, 52 id. 404; *Place v. Minster*, 65 id. 104; *Knapp v. Simon*, 96 id. 292; *Coltrick v. Swinburne*, 105 id. 503; *Frear v. Sweet*, 118 id. 458; *Flaherty v. Miner*, 123 id. 390; *Brusie v. Peck Bros. & Co.*, 135 id. 622; *Tisdale v. Morgan*, 7 Hun, 583; *Lefler v. Sherwood*, 21 id. 573; *Roberts v. Graham*, 6 Wall. 578; *B. N. Bank v. Mayor, etc.*, 63 N. Y. 288.) The evidence showed that the architect's certificate was unreasonably withheld. (*Thomas v. Fleury*, 26 N. Y. 26; *B. Bank v. Mayor, etc.*, 63 id. 336; *Nolan v. Whitney*, 88 id. 648; *Smith v. Alker*, 102 id. 87; *Doll v. Noble*, 116 id. 233; *Flaherty v. Miner*, 123 id. 382; *Thomas v. Stewart*, 132 id. 580; *Crouch v. Guttman*, 134 id. 45; *Thayer v. Wadsworth*,

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19 Pick. 349; *Sinclair v. Tallmadge*, 35 Barb. 606; *Pike v. Nash*, 1 Keyes, 335; *Kingsley v. Brooklyn*, 7 Abb. [N. C.] 45.) The allegation in the answer that the building was finished, obviated the necessity of an architect's certificate of that fact. (*Thomas v. Fleury*, 26 N. Y. 26; *Smith v. Alker*, 102 id. 92; *B. Bank v. Mayor, etc.*, 63 id. 336; *Doll v. Noble*, 116 id. 233; *Van Clief v. Van Vechten*, 130 id. 571; *Crouch v. Guttman*, 134 id. 45; *Murphy v. Buckman*, 69 id. 100.) The claim of damages from delay having been formally abandoned at the trial, the allegations of the answer were sufficient to entitle the plaintiff to judgment without aid from the complaint. (*Van Clief v. Van Vechten*, 130 N. Y. 577; *Larkin v. McMullen*, 120 id. 210; *Graf v. Cunningham*, 109 id. 372; *Murphy v. Buckman*, 69 id. 100; *Robinson v. Stewart*, 10 id. 190; *Vernam v. Smith*, 15 id. 331; *Ayres v. Covill*, 18 Barb. 260; *Miller v. White*, 4 Hun, 62.) The dismissal of the second cause of action was erroneous, it having been admitted by the answer, proved without objection and no defense attempted. (*Frecking v. Rolland*, 53 N. Y. 424; *Train v. H. P. Ins. Co.*, 62 id. 598; *Trustees, etc., v. Kirk*, 68 id. 464; *F. N. Bank v. Dana*, 79 id. 116; *Vail v. Reynolds*, 118 id. 301; *Pratt v. D. H. Ins. Co.*, 130 id. 212.)

Abram Kling for respondent. The plaintiff cannot recover in this action upon the contract set forth in the complaint, as he failed to allege the delivery of the architect's certificate, or that the same was unreasonably withheld from him. (*Byron v. Low*, 109 N. Y. 291; *Smith v. Brady*, 17 id. 173; *Oakley v. Morton*, 11 id. 25; *Glacius v. Black*, 50 id. 145.) The plaintiff's evidence established that the architect was justified in refusing to deliver a certificate required by the contract, and the same was properly refused. (*Knowland v. Whitney*, 88 N. Y. 650; *Tuska v. O'Brien*, 68 id. 446.) The plaintiff's claim that the defendant waived performance of the contract and the certificate of the architect, which was a condition precedent to his right of recovery, because the defendant's

testatrix elected to complete her building after its abandonment by the plaintiff, is clearly untenable. (*Kidd v. McCormack*, 83 N. Y. 391; *Walden v. Eldred*, 11 N. Y. Supp. 856.) The judgment obtained by the sub-contractor Lumbey against the plaintiff, that there had been a total failure to perform, was an adjudication against his right of recovery in this action, as the plaintiff was estopped by the admissions in this answer. (*Tuska v. O'Brien*, 63 N. Y. 446.) The right of recovery on the second cause of action was waived upon the trial. (*Douc v. Dow*, 64 N. Y. 412; *O'Neil v. James*, 43 id. 85.)

Per Curiam. The complaint was dismissed on the ground that it contained no averment that the architect unreasonably withheld his certificate of the completion of the building. The complaint was defective in this respect. By the true construction of the building contract the procuring by the plaintiff of the certificate of the architect that the building had been completed, was a condition precedent to his right to recover under the contract the last installment of \$6,158, for which this action is brought. To meet this condition and to show a right of action it should have been averred in the complaint, either generally or specially, that the conditions precedent had been performed, or if the plaintiff relied upon a matter excusing him from procuring the certificate, the facts should have been stated. (*Thomas v. Fleury*, 26 N. Y. 26; *Bowery National Bank v. Mayor, etc.*, 63 id. 336; *Doll v. Noble*, 116 id. 233; *Oakley v. Morton*, 11 id. 25.) The complaint neither averred that the certificate had been procured nor that it was unreasonably withheld. A copy of the contract containing the provision as to the architect's certificate was annexed to the complaint. The action was upon the contract and the complainant alleged performance by the plaintiff and that the building had been substantially completed according to its terms. The contract made the architect's certificate the evidence of that fact, and the plaintiff could not recover upon an allegation of performance upon proving that the building had in fact been completed, without procuring the architect's

certificate, or showing that it had been unreasonably refused, or that the defendant had waived its production.

A defendant is authorized to raise the objection that the complaint does not state facts sufficient to constitute a cause of action on the trial, although the objection has not been taken either by demurrer or answer. (Code, § 499.) At the conclusion of the plaintiff's evidence the defendant's counsel moved to dismiss the complaint on the ground that under the contract the certificate of the architect was a condition precedent. The counsel for the plaintiff asked to go to the jury upon the question of unreasonable refusal of the architect to give the certificate. The court in answer said that there is no such issue, and referred to the fact that there was no allegation upon the subject in the complaint. This was the first reference on the trial to any defect in the pleading. The complaint set out the contract, its performance by the plaintiff, the amount unpaid, and demanded judgment therefor. The answer denied the complaint and set up as a counterclaim in substance that the plaintiff had not completed the building, but after he had commenced the work abandoned it before completion, and that the defendant, after giving due notice to the plaintiff, proceeded under the fourth section of the contract to complete the building according to the specifications, and did complete it, at a cost of \$2,904.58, and also that the defendant had sustained damages by reason of delay, in a sum stated, and these several sums he demanded should be allowed as a set-off or counterclaim against the demand of the plaintiff.

On the trial the plaintiff proved the contract and proceeded to give evidence in detail of what he had done under it. It was claimed by the defendant that the plaintiff had not complied with the contract in several respects, but the principal ground of objection was that the plaintiff had not complied with the contract in respect to the floor of the basement. The plaintiff insisted that he had complied with the contract in that respect, and proof was given as to a demand upon the architect for a certificate, which was refused.

It is claimed that no question having been raised until the

conclusion of the plaintiff's evidence as to the sufficiency of the complaint upon the point of the architect's certificate, and the trial having proceeded upon the issue whether the work had been actually completed, without objection, it was then too late to raise the question of the sufficiency of the complaint in that respect. The court might very well have permitted an amendment, but no application to amend was made, and we think it was not too late to raise the objection at the conclusion of the plaintiff's case. At least it was in the discretion of the court to entertain it at that stage of the trial.

But we think that the court erred in dismissing the complaint for a different reason. The defendant's counsel on his cross-examination of the plaintiff, proceeded to examine him on new matter not involved in his direct examination, to sustain his counterclaim. He called out the fact that the defendant had given the plaintiff notice under the fourth section of the contract, and had proceeded thereunder to complete the contract. By so doing the provision requiring the architect's certificate was rendered inapplicable. The object of that provision is to furnish to the owner of the building, when called upon to pay the contract price of the work, authentic evidence that the work to be certified has been performed. When the owner himself proceeds under the contract to complete the work he needs no architect's certificate to apprise him whether the contractor has performed his contract. The owner does the work left undone by the contractor, and the contract provides how, in that case, the expense shall be adjusted as between him and the contractor. It is to be deducted from the amount unpaid in the contract, and that amount the owner is assumed to know. Where the contractor in such case sues for any installment, it is open to the owner to show how much he has expended in completing the work, and what allowances ought to be made for defective work, or any matter going in reduction of the claim made. The complaint was defective in omitting suitable allegations for this cause of action. But the plaintiff asked to go to the jury upon this ground, and the trial judge put the nonsuit exclusively upon the ground that

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the complaint failed to aver that a certificate was unreasonably refused. We think this issue as to the completion of the work by the defendant, having been opened by the counsel for the defendant, and it appearing from his evidence that no certificate was necessary to enable the plaintiff to recover the difference between the last installment and the amount expended by the defendant in completing the work, the complaint should not have been dismissed upon the ground upon which the motion was granted, but that the case should have gone to the jury upon the issue so litigated.

The judgment should be reversed and a new trial granted.
All concur.

Judgment reversed.

ANDRES W. KETCHAM et al., Respondents, v. HENRY
NEWMAN et al., Appellants.

Defendants, being about to erect a building in the city of New York upon a lot adjoining a store leased and occupied by plaintiffs, which required an excavation below the foundation of plaintiffs' store, entered into a contract with a firm of professional "shorers," by which that firm agreed "to do the shoring, sheath-piling and bridging (as required by law) that is necessary to erect" the building on defendants' lot, and to be responsible for any accident by improperly doing the work. Said firm, as plaintiffs' evidence tended to show, without their permission and against their protest, entered upon their premises, broke through the walls, inserted needle beams, and occasioned serious damage to their stock of goods. It did not appear that defendants gave any directions to the contractors, advised the entry, or had any knowledge of the circumstances under which the latter entered upon plaintiffs' premises. In an action of trespass the trial court charged that if plaintiffs gave no license to the contractors defendants were liable for the injury. *Held*, error; that defendants had a lawful right to make the excavation, and no duty rested upon them to protect plaintiffs' building save as imposed by the act of 1855 (Chap. 6, Laws of 1855), which requires lot owners in said city proposing to excavate their lots to a depth of more than ten feet to protect, at their own expense, a wall on adjacent premises at or near the boundary line "if afforded the necessary license to enter on the adjoining land and not otherwise;" that the contractors were not authorized by the contract to enter plaintiffs' premises without permis-

sion, but were simply employed to discharge the obligation imposed upon defendants by said act, which required consent as a prerequisite to such entry.

(Argued January 23, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made February 6, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict and also affirmed an order denying a motion directed by the court.

This was an action of trespass.

The plaintiffs were wholesale merchants and lessees of the first floor and basement of No. 632 Broadway, New York city, where they conducted the business of the sale of millinery goods. The defendants owned the adjacent lot on the south, and being about to erect a new building thereon, upon a plan which required their lot to be excavated twenty-two feet below the curb, entered into a written contract with the firm of F. & S. E. Goodwin, professional *shorers*, whereby that firm agreed as follows:

"We agree to do the shoring, sheath-piling and bridging (*as required by law*) that is *necessary* to erect buildings Nos. 628 and 630 Broadway, running through to Crosby street. Do the work, according to plans and specifications, for the sum of one thousand one hundred and seventy-five dollars, work to commence at once when ready, \$1,175; also agree to be responsible for any accident by improperly doing the work."

The foundation of the southern wall of the building occupied by plaintiffs was nine feet below the surface, and unless shored up in some way during the progress of the excavation on the defendants' lot, the wall would naturally be undermined and would probably fall. The contractors entered upon the premises occupied by the plaintiffs and inserted needle beams in the basement of the building, breaking the wall for that purpose, and occasioned serious damage to the stock of goods of the plaintiffs, from dirt, and their exposure to damp-

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ness, and greatly hindered them in the transaction of their business. There was conflicting evidence upon the question whether the contractors obtained permission from the plaintiffs to enter the premises for the purpose of shoring up the wall. The plaintiffs denied that such permission was given, and they gave evidence tending to show that they protested against such entry, and that the contractors, in defiance of their protest, invaded their premises and committed the trespasses of which they complain.

On the part of the defendants one of the contractors testified in substance that before commencing the work he informed one of the plaintiffs that he was employed to do the shoring, and pointed out what was necessary to be done, and that he consented that the witness might proceed with the work. The judge submitted to the jury the question whether such consent was given, and charged them that if consent was given the plaintiffs could not recover in this action. It was conceded that the Goodwins were independent contractors, and the judge so charged the jury. It was shown that they had large experience in this kind of work, and their competency was not questioned. One of the contractors testified that he had forty years' experience, and he further testified: "I know of no other way in which I could have shored up that brick wall than the way which was employed." It does not appear that the defendants gave any directions to the contractors during the progress of the work, or that they had any knowledge of the circumstances under which they entered the plaintiffs' premises, or whether such entry was with or without the license of the plaintiffs. Their connection with the transaction commenced and ended, so far as appears, with the making of the written contract above given, except that one of the plaintiffs, after the work had progressed for some time, asked one of the defendants to intercede with the contractors to do the work in a way which would cause them less inconvenience, which he promised to do. The defendants neither employed nor had any control of the men engaged in the work. They were employed and paid by the contractors.

The court charged the jury that if the plaintiffs gave no license to the contractors to enter the premises to do this work the defendants were liable for the injury sustained by the plaintiffs.

Nathaniel Myers for appellants. The plaintiffs' building was not entitled to be supported by defendants' land. (*Radcliffe v. Mayor, etc.*, 4 N. Y. 203.) It was error for the court to charge the jury that although they should find that plaintiffs had consented to the entry by Goodwin, and to his inserting the needles, still their verdict should be for plaintiffs if they found that Goodwin did his work negligently. (*Butler v. Townsend*, 126 N. Y. 105; *Wyllie v. Palmer*, 137 id. 257; *McCafferty v. S. D., etc., R. R. Co.*, 61 id. 178; *King v. N. Y. C. R. R. Co.*, 66 id. 181.) In no view could the damages sustained by the shoring up of plaintiffs' wall have been more than nominal. The General Term erred in not exercising its power of review on the question of fact as to the excessiveness of the verdict raised by the motion for a new trial. The General Term erred in the law on this point, and, therefore, failed to review the facts. This was error. (*Kaare v. T. S. & I. Co.*, 139 N. Y. 369.)

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Eugene S. Ives for respondents. The defendants are liable for the acts of the persons who committed the trespass. (*Town of Pierrepont v. Loveless*, 72 N. Y. 211; *A. & F. R. R. Co. v. Kimberly*, 87 Ga. 161.) The claim of the appellants to the effect that the defendants had a right to enter upon the premises of the plaintiffs without permission is not sound. (*Johnson v. Oppenheim*, 55 N. Y. 286.) The court properly excluded the paper stated by the counsel for the defendants to be a general assignment for the benefit of creditors by two of the plaintiffs to William A. Merrill, dated October 20, 1884. It does not appear to have been proved and is not a part of the case; but even if it had been proved to be what the counsel stated it was, its exclusion was proper. (*Ruthy v. C. F. J. Co.*, 52 Hun, 492.)

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ANDREWS, Ch. J. The entry by the contractors upon the premises without the license and against the protest of the plaintiffs was a trespass, and rendered them liable for the damages sustained by the plaintiffs to their possession and to the merchandise in the store resulting from the unlawful entry. The liability would extend also to any person who advised or directed the unlawful acts. It was upon this principle that the court charged the jury that the defendants were liable if the entry was without the license of the plaintiffs. The court regarded the contract made by the defendants with the contractors as in law a direction by them to the contractors to commit the trespass complained of. If this view is well founded there was no error in the charge. But we are of the opinion that the construction placed upon the contract by the trial judge is not warranted. The Goodwins were independent contractors. This was so ruled by the court on the trial and was conceded on the argument here. This fact is only important to exclude any liability founded on the ordinary relation of master and servant. Where this relation exists the master may be liable for the wrongful act of the servant, although committed without his authority and even in violation of his instructions, provided it was committed in the business of the master and within the scope of the servant's employment. (*Higgins v. Waterliet Turnpike Co.*, 46 N. Y. 23.)

But where a trespass has been committed upon the rights or property of another, by the advice or direction of a defendant, it is wholly unimportant what contractual or other relation existed between the immediate agent of the wrong and the person sought to be charged. The latter cannot shelter himself under the plea that the immediate wrongdoer did the act in execution of a contract, or that he came within the definition of an independent contractor as to the performance of the work in the execution of which the tortious act was committed. If he advised or directed the act his liability is established.

The contract entered into between the defendants and the

contractors did not, as we construe it, authorize the contractors to commit a trespass upon the premises of the plaintiffs. In construing the contract it is important to consider the situation. The defendants were about to tear down the old building on their premises, and erect a new one according to plans which required an excavation of their lot to the depth of 22 feet. They had a lawful right to make the excavation. The excavation would probably endanger the adjacent wall of the building of the plaintiffs. No common-law duty was imposed upon the defendants to shore up or protect the wall from injury. The building of the plaintiffs had no easement of support by the land of the defendants. The rule of the common law placed the burden of protecting the wall from injury from the excavation upon the owners of the wall. The defendants were bound only to the exercise of reasonable care in making the excavation, doing no unnecessary damage. (*Dorrity v. Rapp*, 72 N. Y. 308 and cases cited.) Under the common law they had no right to enter upon the premises of the plaintiffs to shore up the wall, nor would they have been under any duty to do so, even if they were permitted by the owners of adjacent premises. The legislature, recognizing the hardships imposed upon owners of improved property by the rule of common law, intervened by the act, chap. 6 of the Laws of 1855, as to the cities of New York and Brooklyn. By that act the duty was imposed upon lot owners proposing to excavate their lots to the depth of more than ten feet below the curb, to protect at their own expense a wall on or near the boundary line of adjacent premises from injury from such excavation, "if afforded the necessary license to enter on the adjoining land, and not otherwise." The contract between the defendants and the contractors was made under this condition of the law. The defendants contemplated an excavation on their lot more than ten feet in depth. The law of 1885 cast upon them the duty to protect the wall on the lot of the plaintiffs, "if afforded the necessary license to enter" for that purpose. The defendants made the contract, as is to be inferred, without having obtained the permission of the

plaintiffs to enter upon their premises, but upon the assumption that the permission would be given. The contractors bound themselves to do the shoring "as required by law." They were not authorized by the contract to enter the adjacent premises without permission of the owners and occupants. It was necessarily implied that they were employed to discharge the obligation imposed upon the defendants by the act of 1855, and it was a prerequisite that the consent of the owners or occupants should be obtained before entry could be lawfully made. The defendants neither in terms authorized an entry by the contractors as trespassers, nor can such intention be presumed. On the contrary, the contractors were to act "as required by law." It would have been a complete answer to a claim by the defendants for a breach of the contract by the contractors, that the latter were unable to obtain the permission of the plaintiffs to enter the premises to do the work required, and that it could not have been done without such entry. If there was any evidence that the defendants advised or directed the trespass, other than that furnished by the contract, it should have been submitted to the jury. There was none to justify a ruling as matter of law that in the absence of a license to enter the defendants were liable.

We think the trial judge erred, and that the judgment below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

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HENRIETTA W. WOOD, Appellant, v. HORACE G. YOUNG, as
Executor, etc., Respondent.

The duty rests upon a party receiving money for the use of another to pay it over as soon as received, or, at least, within a reasonable time, and an action is maintainable by the latter to recover the same without demand.

It seems that in the case of an attorney who has collected money for a client, the Statute of Limitations begins to run against the latter's cause of action from the time he has knowledge of the collection.

Plaintiff executed to her half-brother C., defendant's testator, a power of attorney, authorizing him to collect the amount of an insurance policy held by her upon the life of her deceased husband. C. collected the amount, and without the consent of plaintiff appropriated it to his own use, and never paid the same or any part thereof or accounted to her therefor. On reference of a claim for the amount it appeared that for more than ten years before the presentation of the claim, plaintiff supposed and believed C. had received the money, but that she never demanded the same. *Held*, that the claim was properly dismissed on the ground that it was barred by the Statute of Limitations; that no trust or fiduciary relation existed between the parties growing out of their relationship, which required a demand or actual knowledge of the facts by plaintiff before the right of action accrued; and that the only legal relation between the parties was that of debtor and creditor.

(Argued January 24, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 12, 1893, which affirmed a judgment in favor of defendant entered upon an order of Special Term confirming the report of a referee.

This was a reference under the statute of a disputed claim presented by plaintiff to defendant as executor of the will of Thomas Cornell, deceased.

The facts, so far as material, are stated in the opinion.

F. L. Westbrook for appellant. The referee should have found the conclusions of law proposed by the plaintiff, that the action is not barred by the Statute of Limitations; that the Statute of Limitations did not begin to run against the plaintiff until the demand made for the money in September, 1892, and that plaintiff is entitled to recover the money so collected by Thomas Cornell. (*People v. Gilbert*, 18 Johns. 228; *Wilcox v. Fitch*, 20 id. 472; *U. S. v. Thompson*, 98 U. S. 486; *Hulbert v. Clark*, 128 N. Y. 297; Code Civ. Pro. §§ 381, 413; *Andrews v. Moller*, 37 Hun, 482; *Comby v. Smith*, 78 Mo. 41; *Lewis v. Mason*, 84 Va. 731; *Street v. Chapman*, 29 Ind. 142; Wood on Limitations, 85, 87, 88.) The conclusion of law of the referee that this action is barred

by the six years' limitation of the statute is not only wrong for the reason that it is an action on a sealed instrument, but for the reason that even if it is based on an implied promise arising outside of the instrument it comes within the provisions of section 410 of the Code of Civil Procedure. (*Bigelow v. Bemis*, 2 Allen, 496; *Acker v. Acker*, 81 N. Y. 143, 148; *People v. French*, 31 Hun, 618; *Patterson v. Gaines*, 6 How. [U. S.] 601, 602; *Rathburn v. Ingalls*, 7 Wend. 320; *Wood v. Rabe*, 96 N. Y. 426; *Reitz v. Reitz*, 80 id. 543; Code Crim. Pro. § 410.) If it should be argued by respondent that Cornell, having converted the plaintiff's money to his own use, and that made him liable to an action for trover and conversion, and that in such actions the Statute of Limitations begins to run at the time of the conversion, whether or not plaintiff knew of the conversion, we answer: This action is for a breach of contract, and the rule in trover or conversion does not apply. (*Lamb v. Clark*, 5 Pick. 193.) The Statute of Limitations did not begin to run in favor of Cornell or his estate until the demand made for the money received by him for the policy of insurance, for the reason that he was a bailee or depositary of it. (*Payne v. Gardiner*, 29 N. Y. 146, 172; *Boughton v. Flint*, 74 id. 476, 482; *Van Allen v. Bank*, 52 id. 1; *Baker v. Bank*, 100 id. 33; *Holmes v. Gilman*, 138 id. 376.) This action was not barred by the Statute of Limitations for the reason that Cornell was a trustee of an express trust. (*Urann v. Coates*, 109 Mass. 585; *King v. Mackellar*, 109 N. Y. 215; *Comstock's Appeal*, 55 Conn. 214, 221; *Hamer v. Sidway*, 12 N. Y. 549, 550; *Lamb v. Clark*, 5 Pick. 197; *Mills v. Mills*, 115 N. Y. 80.) The referee held that Cornell was a mere collecting agent, and that in such case the statute begins to run when the money was received, and the remedy to recover it was barred in six years from that time. This was error. (*Taylor v. Bates*, 5 Cow. 376; *Hays v. Stone*, 7 Hill, 131; *Stocking v. Hunt*, 3 Den. 276; *Gilman v. Cutts*, 23 N. H. 376; *State v. Clark*, 7 Ind. 468; *Patterson v. Gaines*, 6 How. [U. S.] 601; *H. I. Co. v. Alger*, 54 N. Y. 177; *Bork v. Martin*, 132 id. 285.) Any competent evidence which

tends to show that the debt is unpaid is admissible for that purpose. (*Jackson v. Sackett*, 7 Wend. 94; *Read v. Read*, 46 Penn. St. 239; *Morris v. Wadsworth*, 17 Wend. 103; *Bean v. Tonnelle*, 94 N. Y. 385, 386; *Walker v. Robinson*, 136 Mass. 280; *Felon v. Dickerson*, 10 id. 207; *Mullen v. Whipple*, 1 Gray, 323.)

A. T. Clearwater for respondent. The plaintiff's claim is barred by the Statute of Limitations. (*Mills v. Mills*, 115 N. Y. 80; *Stacy v. Graham*, 14 id. 492; *In re Cole*, 34 Hun, 320; *Compton v. Elliott*, 16 J. & S. 211; *Diefenthaler v. Mayor, etc.*, 111 N. Y. 331; *Sheldon v. Sheldon*, 133 id. 1; *Thatcher v. H. C. Assn.*, 126 id. 507; *Hickok v. Hickok*, 13 Barb. 632; *Lillie v. Hoyt*, 5 Hill, 395; *Carr v. Thompson*, 87 N. Y. 160; *King v. Mackellar*, 109 id. 215; *Bronson v. Munson*, 29 Hun, 54; *Lammer v. Stoddard*, 103 N. Y. 672; *Bruce v. Tilson*, 25 N. Y. 194, 198; *In re Neilley*, 95 id. 382.) The case is not within the exception of the provisions of section 410 of the Code of Civil Procedure. (*Howard v. France*, 43 N. Y. 593; *Wheeler v. Warner*, 47 id. 579; *Lammer v. Stoddard*, 103 id. 672; *Mills v. Mills*, 115 id. 80; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Thatcher v. H. C. Assn.*, 126 N. Y. 517; *Hickok v. Hickok*, 13 Barb. 632; Code Civ. Pro. § 829; *Flagg v. Ruder*, 1 Bradf. 192; *Bean v. Tonnele*, 94 N. Y. 581-585; *Macauley v. Palmer*, 125 id. 742; *Sheldon v. Sheldon*, 133 id. 1-5; *Read v. Gannon*, 50 id. 345, 350; *Kettlewill v. Watson*, L. R. [21 Ch.] 704; 2 Pom. Eq. Juris. 40, §§ 595, 596, 606.) Particularly is the statute applicable to such cases as the one at bar, in which the party having knowledge of all the facts is dead, and the mouths of his legatees are closed by the provisions of section 829 of the Code of Civil Procedure. (*U. S. v. Wiley*, 11 Wall. 508, 513; *Spring v. Gray*, 5 Mass. 523; *Philip v. Pope*, 10 B. Mon. 163; *McCarty v. White*, 21 Cal. 495; *Dickinson v. McCamy*, 5 Ga. 486; *McClung v. Silliman*, 3 Pet. [U. S.] 270; *Gautier v. Franklin*, 1 Tex. 732; *Gorman v. Judge of Newaggio Circuit*, 27 Mich. 138; *Roberts v. Pillow*,

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Hemp. 624; *U. S. v. Wilder*, 13 Wall. 251; *Teackle v. Gibson*, 8 Md. 70; *Crocker v. Cleman*, 23 Ala. 296; *Platt v. Northam*, 5 Mass. 95; *Bailey v. Carter*, 7 Ired. [N. C.] Eq. 282; *Hovend v. Lord Anesley*, 2 Sch. & Lef. 607, 629; *Wilhelm v. Caylor*, 32 Md. 151; *Ayer v. Stuart*, 14 Minn. 97; *Dodge v. E. Ins. Co.*, 12 Gray, 65; *Longworth v. Hunt*, 11 Ohio, 194, 201; 2 Story's Eq. Juris. § 1520; *Harris v. Saunders*, 4 B. & C. 411; *Beatty v. Burns*, 8 Cranch, 98; *Chiveley v. Bond*, 4 Md. 105; *Harcourt v. White*, 28 Beav. 303; *McDonald v. White*, 11 H. L. Cas. 750; *Hunt v. Ellison*, 32 Ala. 173; *Hamlin v. Mebane*, 1 Jones [N. C.] Eq. 18; *Wilson v. Anthony*, 19 Ark. 16; *Askew v. Hooper*, 28 Ala. 634; *Palmer v. Malone*, 1 Heisk. 549; *New Albany v. Burke*, 11 Wall. 96; *Badger v. Badger*, 2 Cliff. C. C. 137; *Mobley v. Cureton*, 2 S. C. 140; *Havens v. Patterson*, 43 N. Y. 218.)

O'BRIEN, J. The plaintiff is the half sister of Thomas Cornell, who died in the month of March, 1890, leaving a will of which the defendant is the executor. On the 26th of September, 1892, the plaintiff presented the claim which is the subject of this controversy against his estate to the executor, in which she demanded, as her due, the sum of \$5,000, with interest thereon from the first day of April, 1876. The claim was disputed by the executor and referred under the statute applicable in such cases, and the referee dismissed the claim upon the ground that it was barred by the Statute of Limitations. His report was confirmed by the court and the judgment entered thereon affirmed at the General Term. The facts upon which the decision rests are not disputed, and the only question presented is one of law with respect to the application of the statute to these facts. On the 25th of February, 1871, the plaintiff insured her husband's life for \$5,000, payable to her upon his death. He died on the 29th of January, 1876, and proofs of death were filed and the policy, having matured, and the claim perfected she was entitled to receive the amount from the insurance company. On the 26th of

February, 1876, the plaintiff executed to the deceased a power of attorney authorizing him to demand and receive from the company the moneys due her under the policy, and they were actually paid to him on the 15th of April following, namely, the sum of \$5,298.45. The referee has found that the deceased knew that the sum so received by him belonged to the plaintiff, and that for more than ten years prior to the presentation of her claim the plaintiff supposed and believed that her brother had collected and received the money. There are also special findings to the effect that during all the time from the receipt of the money to the death of the testator, the plaintiff and her brother resided in the same county within about eight miles of each other; that their relations were cordial and intimate, frequently visiting each other, but that the plaintiff never demanded of the deceased the money so collected by him for her. It is then found that the deceased, without the consent of the plaintiff, appropriated the avails of the policy collected by him to his own use, and never paid over the same nor any part thereof to her, nor accounted to her therefor. The proof at the trial showed that the deceased, upon receiving the money, deposited the same to his own credit in a bank where his business was done, and that about the same time the deceased paid certain notes, drafts or other obligations of plaintiff's husband, upon some of which he was liable as indorser, amounting to a larger sum. There is no finding or proof that the plaintiff ever consented to this use of the money, so that the liability of the defendant, as the representative of the estate, must be determined upon the facts as found.

By section 382 of the Code an action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument, is barred after the lapse of six years from the time when the cause of action accrued. By section 410, wherever a demand is necessary to entitle a party to maintain the action, the statute begins to run only from the time of the demand, except with respect to certain cases mentioned in the first subdivision of the section, as to which the statute begins

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to run from the time when the person having the right to make the demand has actual knowledge of the facts upon which the right depends. If, upon the receipt by the deceased of the money and the deposit by him of the same to his credit in the bank, the plaintiff could have maintained an action for its recovery at once, and without any demand whatever, then the decision of the referee was clearly correct and this appeal cannot be sustained. The learned counsel for the plaintiff contends with much earnestness, in an argument that shows great care and research in its preparation, that some trust or fiduciary relation existed between the parties growing out of their relationship to each other, and from the nature of the transaction, which required a demand to be made, or at least actual knowledge of the facts upon which that right depended, before the right to maintain the action was complete. But after a careful consideration of the authorities cited, and of all the reasons urged in support of his theory of the case, we are of the opinion that his position cannot be sustained.

The facts of the case establish no other legal relations between the parties than that of debtor and creditor. The deceased had received from the insurance company moneys that belonged to the plaintiff by her direction and authority. It was the ordinary case of the receipt of money by one to and for the use of another, in which the duty rests upon the party receiving the money, from the moment of its receipt, to pay it over to the party for whose use it was received. It was the plaintiff's money. The deceased had no lien upon it—no right to retain it, nor any trust duty to discharge in respect to it. The law imposed upon him the obligation to pay it over to the plaintiff as soon as received, or at least within a reasonable time. There was nothing in the circumstances under which the money came to the hands of the testator from which the right or duty can be implied to hold it until actually called for by the owner. The obligation of the party who has received the money in such cases to pay it over, and his liability in an action to recover the same, without any demand before suit, has been firmly settled by a long line of cases that

cannot be distinguished from this by any sound distinction. (*Mills v. Mills*, 115 N. Y. 80; *Adams v. Olin*, 140 id. 150; *Sheldon v. Sheldon*, 133 id. 1; *Roberts v. Ely*, 113 id. 123; *Middleton v. Twombly*, 125 id. 520; *Diefenthaler v. Mayor, etc.*, 111 id. 331; *Jex v. Mayor, etc.*, Id. 339; *Stacy v. Graham*, 14 id. 492; *Carr v. Thompson*, 87 id. 160; *King v. Mackellar*, 109 id. 215; *Lammer v. Stoddard*, 103 id. 672; *In re Neilley*, 95 id. 382; *Lillie v. Hoyt*, 5 Hill, 395; *Hickok v. Hickok*, 13 Barb. 632.)

The case of an attorney at law or a foreign factor is, perhaps, an exception to this general rule. An attorney at law has a lien upon the funds of his client collected in his professional capacity. By the common law he was not subject to an action for moneys so collected until after demand and refusal to pay, except in cases where he had applied the money to his own use, or otherwise wrongfully dealt with it. (*Taylor v. Bates*, 5 Cowen, 376.) When an attorney has acted in good faith with respect to the money of his client which he has collected, he should be protected from the costs of a suit until, upon demand, he neglects or refuses to pay. But if the client has knowledge of the receipt of the money by the attorney, then the Statute of Limitations will begin to run from the time when the client had such knowledge, because upon that his right to make the demand may be said in such cases to depend. (*Bronson v. Munson*, 29 Hun, 54.)

This exception to the general rule is, however, based upon reasons that have no application to this case. But even if we could apply the same rule governing actions against an attorney at law, still the finding as to the knowledge by the plaintiff of the receipt of the money would set the statute running from that time and so defeat the claim.

Our conclusion is that there was no error in the decision of the referee, and that the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

PHILIP H. MOORE et al., as Executors, etc., Respondents, v.
 THE HANOVER FIRE INSURANCE COMPANY of the City of
 New York, Impleaded, etc., Appellant.

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155	184

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166	323

Where by a policy of fire insurance, issued to the owner of mortgaged premises, loss, if any, is made payable to the mortgagee, as his interest may appear, the undertaking so to pay is collateral and dependent upon the principal undertaking, and if there is a breach of conditions in the policy by the assured, which by its terms renders it void, this defeats a recovery thereon by the mortgagee.

Defendant issued to S. a standard policy in the form prescribed by the act of 1886 (Chap. 488, Laws of 1886), loss, if any, payable to R., plaintiffs' testator, mortgagee, as interest may appear. The policy contained conditions to the effect that it would become void, "unless otherwise provided by agreement," indorsed upon the policy or added thereto, "if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage." Also, that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement," and as to those that they should not be deemed to have been waived unless the waiver shall be written upon or attached to the policy. Also, that no privilege or permission affecting the insurance should be claimed unless so written or attached. In an action upon the policy these facts appeared: Plaintiffs brought an action to foreclose the mortgage, obtained judgment, and in pursuance thereof the premises were advertised to be sold. Three days before the date of sale the building insured was destroyed by fire. Before the commencement of the foreclosure suit plaintiffs informed T., a duly authorized agent of defendant, who, as such agent, had signed the policy, that they were about to commence such proceedings, and he agreed that this might be done without injuring plaintiffs' rights under the policy. No such agreement or consent was indorsed upon or annexed to the policy, and it did not appear that T. noted upon any register kept by him that said action had been commenced. S., the insured, had knowledge of the foreclosure suit on the day it was commenced. *Held*, that the verbal assent of the agent did not constitute a waiver of the conditions; and that the foreclosure suit and sale rendered the policy void.

Moore v. Hanover F. Ins. Co. (71 Hun, 199), reversed.

(Argued January 25, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered

upon an order made July 28, 1893, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs as executors of Barbara C. Rikert, deceased, upon a fire insurance policy issued by defendant to Maggie P. C. Smith, loss, if any, being made payable to plaintiffs' testatrix as mortgagee.

The facts, so far as material, are set forth in the opinion.

A. T. Clearwater for appellant. The policy was invalidated by the bringing of the action of foreclosure, and the appellant should have had judgment at the trial. (*Baumgartel v. P. W. Ins. Co.*, 136 N. Y. 547; *Allen v. G. A. Co.*, 123 id. 6; *Quinlan v. P. W. Ins. Co.*, 133 id. 356; *Messelback v. Norman*, 122 id. 583; *Walsh v. H. Ins. Co.*, 73 id. 5; *O'Brien v. P. Ins. Co.*, 134 id. 28; *Weed v. L. & L. F. Ins. Co.*, 116 id. 106; *Armstrong v. A. Ins. Co.*, 130 id. 560; *Smith v. N. Ins. Co.*, 60 Vt. 282.) The assured, Maggie P. C. Smith, having refused to make proofs of loss, and the policy distinctly requiring that within sixty days after the fire, unless such time was extended in writing, by the company, the insured should render a statement to the company, signed and sworn to by her, stating her knowledge and belief as to the time and origin of the fire, her interest, and that of all others in the property and the various other matters specified in the policy, the plaintiffs cannot recover. (*E. Ins. Co. v. R. Ins. Co.*, 55 N. Y. 359; *Foster v. Van Reid*, 70 id. 24; *Grave v. B. M. Ins. Co.*, 2 Cranch, 419; *F. S. Bank v. A. Ins. Co.*, 125 Mass. 431; *W. S. Bank v. C. O. Ins. Co.*, 29 Conn. 374; *Sias v. R. W. Ins. Co.*, 9 Ins. L. J. 154; *Hyme v. Woodworth*, 93 N. Y. 75; *Quinlan v. P. W. Ins. Co.*, 133 id. 356.) There has been no waiver by the defendant in the manner provided by the policy. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 411; *Weed v. L. & L. F. Ins. Co.*, 116 id. 16.) The complaint does not allege the waiver of any condition of the policy, but, upon the contrary, alleges due performance upon the part of the plaintiffs of its conditions. (*Clift v. Rogers*, 25 Hun, 39;

Oakley v. Martin, 11 N. Y. 25; *Eisman v. H. Ins. Co.*, 74 Iowa, 11.)

Esselstyn & McCarty for respondents. When a third party like the mortgagee is concerned, the company assumes the burden, and if it fails to notify the mortgagee or cancel the policy it waives the condition requiring written consent of foreclosure to be indorsed upon the policy. The defendant had notice of the foreclosure. It was its duty to act. Failure to do so waived the condition. (*Armstrong v. A. Ins. Co.*, 56 Hun, 399; *Titus v. G. F. Ins. Co.*, 81 N. Y. 410; *Baldwin v. C. Ins. Co.*, 15 N. Y. Supp. 587.) Any condition or forfeiture may be waived. (*Bermington v. A. Ins. Co.*, 93 N. Y. 495; *Roby v. A. C. Ins. Co.*, 120 id. 510; *McNally v. P. Ins. Co.*, 137 id. 389; *Baldwin v. C. Ins. Co.*, 15 N. Y. Supp. 587.) The fact that the company received the proofs of loss as presented and never returned or objected to the sufficiency or regularity thereof, except as to their not being made by the assured, must conclude it from objecting thereto on the ground of not being served in time. (*Armstrong v. A. Ins. Co.*, 56 Hun, 400.)

BARTLETT, J. On the 15th of July, 1890, defendant insured the property of one Maggie P. C. Smith for a period of three years, issuing to her a standard policy, the loss, if any, first payable to Barbara C. Rikert, mortgagee, as interest might appear.

Barbara C. Rikert was the owner of a mortgage covering the insured premises, executed by Maggie P. C. Smith, the owner. On the 17th of August, 1891, Mrs. Rikert having died in the meantime, her legal representatives began an action to foreclose said mortgage, which proceeded to judgment, and the premises were advertised to be sold October 26th, 1891. Three days before the date of sale the dwelling house covered by the policy was destroyed by fire. The defendant declined to pay the loss, and plaintiffs, as legal representatives of the mortgagee, began this action to enforce payment.

The answer sets up, by way of defense, that the defendant did not have knowledge or notice of the commencement of the said foreclosure proceedings, or of the notice given by the referee of the sale of the property covered by the said policy, nor did the defendant assent thereto by agreement indorsed upon the policy. The policy reads that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed." The special term found that both the plaintiffs and Maggie P. C. Smith, the insured under said policy, had knowledge of the said foreclosure proceedings on the said 17th day of August, 1891. The policy contains a further condition material to be considered, viz.: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement, indorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The special term found that, before the commencement of the foreclosure proceedings upon the mortgage alleged in the complaint, the plaintiffs in this action informed J. H. Thorn, a duly authorized agent of this defendant at Rhinebeck, that they were about to commence such proceedings, and the said agent agreed that such proceedings might be commenced without injuring the plaintiffs' rights under the policy.

It is further found that there is no evidence that the said

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J. H. Thorn, the alleged agent of the defendant, ever noted upon any register kept by him that the said foreclosure action or proceeding had been commenced. The policy was read in evidence, and is signed by the president and secretary of the defendant and by J. H. Thorn, agent. There is no other proof as to the power and authority of Mr. Thorn, except that he was the duly authorized agent at Rhinebeck and signed the policy as above.

It is also found that no agreement or consent for the commencement of the said foreclosure action and proceedings, or for the giving of a notice of the sale of the property covered by the said policy, or by virtue of the said mortgage and of the foreclosure of the same, was indorsed upon the said policy of insurance or added thereto.

The defendant insists that, in the absence of such agreement or consent indorsed upon the policy, the foreclosure action and sale rendered the policy void.

The court below held the notice to the agent Thorn of Rhinebeck that the action was about to be commenced and his verbal assent thereto constituted a waiver of the provisions of the policy. We are of opinion that this is error, and the judgment appealed from cannot be sustained.

There was no mortgagee clause attached to this policy, simply the provision that loss, if any, first payable to mortgagee as interest may appear. The contract of insurance was with the mortgagor, and the undertaking to pay the loss to the mortgagee was collateral and dependent upon the principal undertaking, and if there has been a breach of the conditions of the policy by the assured the plaintiff cannot recover. (*Weed v. London & L. Fire Ins. Co.*, 116 N. Y. 106; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 id. 391; *Bidwell v. Northwestern Ins. Co.*, 19 id. 179; *Perry v. Lorillard Fire Ins. Co.*, 61 id. 214.)

The sole question is the construction of the standard policy issued under the requirements of chapter 488, Laws of 1886.

The precise point involved in this case has been before this court frequently since the enactment of the law of 1886. The

use of the standard policy was compelled by legislative enactment to remedy existing evils, and, among others, to protect insurance companies from the perils of alleged parol waivers by their local agents.

Every person who now enters into a contract of insurance is required to agree that no officer or agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms thereof may be subject of agreement indorsed thereon, and as to such provisions and conditions the waiver must be written upon or attached to the policy, and he specially covenants that he will not claim any privilege or permission unless it be in writing.

The judgment appealed from ignores the plain provisions of the contract of the parties relating to foreclosure and waiver, and is contrary to the decisions of this court on the precise point presented now, and others which involve the same principle of construction. In *Quinlan v. Providence Washington Ins. Co.* (133 N. Y. 356) the necessity of notice in case of foreclosure was considered. Judge ANDREWS, in discussing the question of alleged waiver, said (p. 363): "It is to be assumed that Kelsey" (the agent of the company) "learned of the commencement of the foreclosure proceedings, and thereupon assured the plaintiff that his rights under the policy would not be prejudiced thereby."

Again, at page 366, after holding that the principle that courts lean against forfeitures is unimpaired, says: "But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company."

The following cases are also in harmony with these views, viz.: (*Armstrong v. Agri. Ins. Co.*, 130 N. Y. 560; *Baumgartel v. Prov. W. Ins. Co.*, 136 id. 547; *Allen v. German Am. Ins. Co.*, 123 id. 6; *Messelback v. Norman*, 122 id. 583;

O'Brien v. Prescott Ins. Co., 134 id. 28; *Lett v. Guardian Fire Ins. Co.*, 125 id. 82.)

The foregoing cases are so cogently reasoned and the conclusions stated therein have so long been the settled law of this court, it is unnecessary now to do more than refer to them.

The judgment appealed from is reversed, and a new trial ordered, with costs in all the courts to abide the event.

All concur.

Judgment reversed.

LEMUEL LYON, Respondent, v. HENRY P. RICKER, Appellant.

Declarations of a deceased person, made when he was in possession of real estate, in reference to his title thereto, which were against his interest, may be given in evidence even in an action between third parties where the title comes in question.

Plaintiff's complaint alleged that his father executed and delivered to defendant a warranty deed conveying certain premises then in the possession of the grantor to plaintiff, with instructions to deliver the same to the latter on the death of the grantor, and that defendant, upon demand made after such death, refused to deliver the same. Defendant's answer denied certain of the allegations of the complaint, but made no claim to the deed or any interest in it, simply stating that he "retains possession of the deed for the reason that he does not know to whom to deliver it or his duties in the premises." The only evidence as to the purpose of the delivery of the deed to defendant was testimony of declarations of the grantor after making the deed, and while in possession of the land, to the effect that he had made out the deed in question, and another deed to plaintiff's brother, and left them with defendant, to be given to the grantees on his (the grantor's) death. *Held*, that the evidence was competent; and so, that objections thereto were properly overruled.

One of the witnesses to prove these declarations was said brother. *Held*, that the fact that he occupied the same position as plaintiff, while it might go to his credibility, did not render his testimony incompetent.

The testimony of defendant as a witness in his own behalf, as to what took place between him and the grantor was offered and rejected. *Held*, no error (Code Civ. Pro. § 829); that the testimony was not made competent by the fact that the declarations of the grantor made at other times had been received on behalf of plaintiff.

(Submitted January 30, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 29, 1892, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The plaintiff commenced this action to recover from the defendant a certain deed alleged to have been executed by plaintiff's father and delivered to defendant under instructions to deliver the same to the plaintiff upon the death of the grantor.

It was alleged in the complaint that the deed was executed and acknowledged by the grantor and that it conveyed about seventy-five acres of land to the plaintiff, who was the son of the grantor, and that in the deed there was a provision that the grantee (the plaintiff herein) was not to have possession of the premises until the death of the grantor. It was further alleged that the deed so executed was delivered by the grantor to the defendant, to be delivered to the plaintiff upon the death of the grantor, who at the time was in the possession and was the owner of the land described in the deed, and so continued up to the time of his death in 1889. The defendant, it was also alleged, had, ever since the death of the grantor, kept possession of the deed and refused to deliver it to the plaintiff, although the plaintiff had, since the grantor's death, frequently demanded the same from him. The deed has never been recorded, and it was alleged to be necessary to have the possession thereof for the purpose of establishing the plaintiff's title to the land therein described.

The answer of the defendant admits that he drew for the grantor a deed of the premises described in the complaint, and that he took the acknowledgment of the grantor, and that the deed contained the covenants set forth in the complaint (seizin, against incumbrances, good title and warranty), and that at the time the deed was executed the grantor was the owner of the land described in the deed, and was in possession of the same up to his death. The defendant then denied, upon information and belief, each and every allegation in the complaint not before admitted. The answer also contained a

statement that "the defendant retains possession of the deed for the reason that he does not know to whom to deliver it or his duties in the premises, and is not advised what is proper and just for him to do with the deed." He, therefore, asked that the complaint should be dismissed, with costs, and that the court should determine his duties, and he be granted such further relief as should be just.

The case was referred to a referee to hear and decide, who subsequently reported in favor of the plaintiff for a delivery of the deed and for costs. Judgment was entered, and being affirmed at the General Term of the Supreme Court, the defendant has appealed here.

S. M. Norton for appellant. It was claimed on the trial that the denial in the answer was insufficient to raise an issue, and a motion was made for judgment on the pleadings, which was denied, and it was also held that the answer being in that form estopped the defendant from giving positive testimony of the facts so denied. This was error. (*Bennett v. L. M. Co.*, 110 N. Y. 150; *Macauley v. Brownell*, 14 Abb. N. C. 316; *White v. Spencer*, 14 N. Y. 247.) It was error to refuse to allow the defendant to deny the instructions claimed to have been given him by the grantor, and to refuse to allow him to give his version of the transaction. (*Potts v. Mayer*, 86 N. Y. 305; *Wadsworth v. Heermans*, 85 id. 639; *Cole v. Dunn*, 3 Hun. 610; *Marsh v. Brown*, 18 id. 316; *In re Schuyler*, 5 Dem. 369.) It was error to admit the declarations of the grantor against the defendant. (*Wells v. Thornton*, 45 Barb. 390.; *Edw. on Bail*. §§ 72, 73; *Sherman v. Scott*, 15 Wkly. Dig. 149; *Parker v. McLean*, 2 id. 502.) It was error to allow the plaintiff's brother, Henry Lyon, to testify to conversations with the deceased grantor. (*LeClare v. Stewart*, 8 Hun, 127.) There never was a sufficient delivery of the deed to convey title to the plaintiff. (*Hathaway v. Payne*, 34 N. Y. 92; *Crain v. Wright*, 114 id. 307.)

Armstrong & Todd for respondent. Lemuel R. Lyon, the grantor, left the deed with the defendant to be delivered to

the plaintiff after the grantor's death. This constituted a valid delivery to the plaintiff. (*Hathaway v. Payne*, 34 N. Y. 92; *Crain v. Wright*, 114 id. 307; *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617; *Church v. Gillman*, 15 Wend. 656; 1 Whart. on Ev. § 226; Greenl. on Ev. § 147; *Shrader v. Bonker*, 65 Barb. 608; *Livingston v. Arnoux*, 56 N. Y. 507-519; 10 Barb. 202; *Bartlett v. Patten*, 33 W. Va. 71; *In re Kellogg*, 104 N. Y. 648; *Risley v. Wightman*, 13 Hun, 163; *Chadwick v. Fonner*, 69 N. Y. 404; *Rose v. Adams*, 22 Hun, 389; *Knapp v. Hungerford*, 7 id. 588; *Bingham v. Hyland*, 6 N. Y. Supp. 75; *Hackley v. Vrooman*, 62 Barb. 650-666.) The defendant was sworn as a witness in his own behalf, and offered to show, by himself, personal transactions and communications between himself and the deceased grantor relative to the execution and delivery of the deed. The evidence was properly excluded under section 829 of the Code of Civil Procedure. (*Pope v. Allen*, 90 N. Y. 298; *Witthaus v. Schack*, 105 id. 332; *Mattoon v. Young*, 45 id. 696; *Pinney v. Orth*, 88 id. 447.) The plaintiff is entitled to judgment upon the pleadings. (*Bennett v. L. M. Co.*, 110 N. Y. 150; *P. M. Co. v. J. I. Co.*, 33 Hun, 143; *Fallon v. Durrant*, 60 How. 178.) The plaintiff sues to recover possession of the deed described in the complaint, alleged to be wrongfully detained by the defendant. The right to bring such an action has long been recognized by courts of equity, and there can be no doubt that there is ample power to grant the relief asked for. (*Stanton v. Miller*, 65 Barb. 58-72; *Smith v. Cole*, 109 N. Y. 436; Willard's Eq. Juris. [Potter's ed.] chap. 7, p. 361; *Evans v. Van Hall*, 1 Clarke Ch. 10; *Hammond v. Morgan*, 101 N. Y. 179.)

PECKHAM, J. The answer in this case only puts in issue the allegation that the deed in question was confided to defendant to be by him delivered to the plaintiff upon the death of the grantor, and the further allegation of a demand by plaintiff upon defendant for the possession of the deed since the death of the grantor.

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It is claimed that the form of the denial is such that it does not make an issue, because it is alleged upon information and belief, while the matter denied is necessarily within the personal knowledge of the defendant. Without deciding the question of pleading, we prefer to base our decision upon the real questions at issue between the parties. These questions arise upon certain rulings made by the learned referee in the course of the trial in regard to matters of evidence, and if decided in favor of defendant the case of the plaintiff would be barren of any evidence to support it, and the judgment in his favor would have to be reversed.

First. To prove the condition upon which the deed was delivered to the defendant the plaintiff called his mother, the widow of the grantor, and against the objection and exception of the defendant, the plaintiff proved by her that her husband came home after making the deed and said that he had made out deeds to the boys of seventy-five acres of land each, and that he had left the deeds with Ricker to be given to the boys at his death; that he had deeded to them seventy-five acres each of the lands they were living on; that they were to work them as they had done, and that she (the witness) need not sign them for she could have the use of her share while she lived.

Other declarations of a somewhat similar nature were proved by other witnesses. There was no evidence other than these declarations, showing a delivery of the deed to the defendant for the plaintiff and to be given him upon the death of the grantor.

If the action were brought against the heirs at law of the grantor to obtain possession, or if the plaintiff here were defending his possession of the land described in the deed against the claims of the heirs at law, the evidence of declarations such as these in question would be competent. (*Vrooman v. King*, 36 N. Y. 477; *Chadwick v. Fanner*, 69 id. 404.)

Defendant makes no claim to the deed himself, nor does he allege any interest in it whatever. Refusing to deliver it to

the plaintiff because he does not know his duty, as he says, leaves him as representing no interest other than possibly that of the heirs at law, and it can only be urged that he represents them in a very indirect manner by assuming that it might benefit them if the plaintiff were without possession of the deed in a controversy with them as to the title to the land. A judgment in favor of plaintiff in this action would not be evidence in his favor against the heirs in such contest. In such a case, where the defendant makes no claim of right or title to the deed or its possession, and under the circumstances herein detailed, we think these declarations were competent as against the defendant himself. They were made by a party while in the possession of the real estate and in relation to his title, and they were made against his interest, and he was deceased at the time the proof was given. In such cases declarations of a deceased person may be given in evidence even in actions between third parties. (1 Ph. on Ev., C. & H. & Edwards notes, page 244, note 102; 1 Greenleaf on Ev. § 147 & note; *White v. Chouteau*, 10 Barb. 202; *Schenck v. Warner*, 37 id. 258; *Higham v. Ridgway*, 10 East, 109; *Irat v. Finch*, 1 Taunton, 141; *Peaceable ex dem. Uncle v. Watson*, 4 id. 16.)

In *Papendick v. Bridgwater* (5 Ellis & Blackburn, 166) it was held that the declarations of a deceased tenant as to the non-existence of a right of common on the part of the owner of the land occupied by such tenant, were not admissible, for the reason that the tenant could not derogate from the right of the landlord or owner of the fee by any declaration he might make. The case was stated to be in effect an exception to an exception. Lord CAMPBELL, C. J., in stating the rule said, generally any declaration of a deceased person on a matter with which he is acquainted, made against his interest, is admissible in evidence. But the learned chief justice continued by saying that an exception to this rule was that you cannot admit in evidence the declaration of a tenant which derogates from the title of a reversioner. The distinction is taken between declarations against interest and those made by

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one in privity of estate. In the first case, the evidence is admissible without privity of estate, and hence declarations must be not only against interest, but the declarant must be dead, while in the case of declarations by one in privity of estate, the declarations are admissible whether the declarant be alive or dead. (Per CAMPBELL, C. J., at top of page 178 in the 85th Eng. Com. Law Series, reporting above case in 5 Ellis & B.) Lord COLERIDGE in same case said that if the tenant were alive he would not be called and asked whether when tenant he had or had not the right, for the purpose of cutting down the landlord's title by the answer, and how, therefore, could his declaration have any such effect. The court receives declarations of a deceased person against his interest because of the likelihood of their being true, of their general freedom from any reasonable probability of fraud, and because they cannot be set up or proven until the death of the party making them.

We think it plain that the declarations of the deceased grantor were admissible against the defendant, although the latter claimed nothing under the grantor, and was not, therefore, strictly in privity with him. The principle is discussed at length in *Higham v. Ridgway* (10 East, *supra*), and the declarations admitted in that case show the ground upon which the courts proceed. We think the referee committed no error in admitting this evidence.

Second. Upon the question of admitting the defendant's evidence as to what took place between him and the grantor in the deed regarding the delivery to the plaintiff, we are of the opinion the referee correctly decided when he rejected the offered testimony. It seems to come directly within the provisions of section 829 of the Code of Civil Procedure. When the plaintiff proved by third parties the declarations of the deceased grantor made at a different time and upon another occasion than the transaction between the deceased and this defendant, those declarations so proved did not become the testimony of the deceased given in evidence within the section of the Code under consideration.

Although declarations against interest are admitted the same as if the declarant were present and testified in person, yet proof of such declarations by competent third parties is not, within the meaning of this section, the testimony of a deceased person, and it does not open the door for the admission of what would otherwise be plainly incompetent evidence under such section. The cases cited by defendant do not so hold so far as this court has decided them.

The fact that the brother of the plaintiff occupies the same position in regard to his seventy-five acres as the plaintiff does to the land described in this deed, does not render the brother's evidence incompetent. The record does not fully show that such is the exact fact, but assuming it, the fact itself, while it might go to the credibility of the witness, does not touch the competency of his testimony. (*Hobart v. Hobart*, 62 N. Y. 80.) The referee herein has written a most satisfactory opinion in giving his reasons for his various rulings, and it is unnecessary to further elaborate our own.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THE EQUITY GAS LIGHT COMPANY of the Eastern District
of the City of Brooklyn et al., Appellants.

The attorney-general cannot maintain an action in the name of the People against a corporation, either under the Code of Civil Procedure (§ 1948) or as a matter of common law, to restrain the commission of a nuisance in a city street by a corporation, where local officials have authority to protect the street.

The jurisdiction of a court of equity to abate an existing and prevent a threatened nuisance upon application of the attorney-general, is limited to those public nuisances which affect and endanger the public safety or convenience and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by other constituted authorities and public officers.

Accordingly *held*, that an action brought by the attorney-general in the name of the People was not maintainable against an incorporated gas

light company, a contractor with it and one of its officers, to restrain the laying of gas pipes in a street in the city of Brooklyn, which was based on the ground that the corporate power of the company had ceased because of failure on its part to commence its business within the period prescribed by law, and that the work would be an injury to the highway and a nuisance.

(Argued January 16, 1894; decided February 6, 1894.)

APPEAL by the defendant, the Equity Gas Works Construction Company, from judgment of the General Term of the City Court of Brooklyn, entered upon an order made April 5, 1893, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term overruling demurrers by said defendant and the defendant John Devlin to the complaint.

The nature of the action and the facts, so far as material, are set forth in the opinion.

B. F. Tracy for appellants. The complaint fails to state facts sufficient to constitute a cause of action. (*B. S. T. Co. v. Brooklyn*, 78 N. Y. 524; *People v. T. H. Co.*, 44 Barb. 633; *People v. N. T. R. & B. Co.*, 47 N. Y. 586; Code Civ. Pro. § 1498.) The provision of the Revised Statutes for a cessation, under certain conditions, of corporate powers, cannot be held to work a self-executing forfeiture in the present case. (*In re N. Y. E. R. R. Co.*, 70 N. Y. 338.) Whether the Equity Gas Light Company has given cause for the forfeiture of its charter depends upon chapter 144 of the Laws of 1874, and not upon the Revised Statutes. (*People v. Bowen*, 21 N. Y. 517; *In re B. E. R. Co.*, 125 id. 334.) The present action is not a proceeding in the nature of a quo warranto, and if it were, such an action cannot be employed to assail vested corporate rights. (Code Civ. Pro. §§ 1798, 1948; *People v. Bowen*, 21 N. Y. 517.) The acts alleged in the complaint are not an exercise of corporate rights, privileges or franchises. (*People ex rel. v. M. G. L. Co.*, 38 Mich. 154; *Slee v. Bloom*, 19 Johns. 358.) Whatever construction may be placed upon the act of 1874, the attorney-general has

no authority to prosecute this suit. (Laws of 1873, chap. 863, § 13; *People v. B. & O. R. R. Co.*, 117 N. Y. 150; *Atty.-Genl. v. M. R. Co.*, 125 Mass. 515; *Atty.-Genl. v. C. G. Co.*, 142 id. 417.) The facts stated in the complaint fail to show that the acts complained of constitute such a public nuisance as to justify the interference of a court of equity by injunction. (*Atty.-Genl. v. S. G. C. Co.*, 3 De G., M. & G. 304; *Kenney v. C. G. Co.*, 142 Mass. 117; *M. G. Co. v. Williamson*, 9 Heisk. 314; *People v. Horton*, 64 N. Y. 610; *Com. v. Passmore*, 1 S. & R. 219; *Wood v. Meers*, 12 Ind. 515; *Regina v. L. G. Co.*, 2 El. & El. 651-667; *Graves v. Shattuck*, 35 N. H. 257.)

William C. De Witt and *Jesse Johnson* for respondent. The authority under which the defendants claimed the right to construct their works in the city of Brooklyn had expired by virtue of an original and absolute limitation. (Laws of 1848, chap. 37; Laws of 1874, chap. 184, § 2.) The statute executed itself, and the corporation lost its corporate powers by failure to organize and commence the transaction of its business within the period prescribed, by force of the primal limitation. (*In re B., W. & N. Co.*, 72 N. Y. 245; 75 id. 335; 81 id. 69; *B. S. T. Co. v. City of Brooklyn*, 78 id. 524; *People v. Bowen*, 30 Barb. 24.) The rule in the *Winfield* case is to be applied only to such cases as come within the principle and justice of the rule, when separately examined, and the language of this court in *Matter of Application of B. E. R. R. Co.* (125 N. Y. 411) had no other or further significance. (*B. S. T. Co. v. City of Brooklyn*, 78 N. Y. 529.) The suggestion that the special act of 1874, relative to the company, appellant, by extending the term prescribed by the general statute, relieved the company from the defeasance is untenable. (*In re B., W. & N. R. R. Co.*, 72 N. Y. 245; *B. S. T. Co. v. City of Brooklyn*, 78 id. 524; *Campbell v. People*, 8 Wend. 639; *Chamberlain v. Chamberlain*, 43 N. Y. 438; Laws of 1874, chap. 144, §§ 1, 2.) The phrase "commence the transaction of its business," consists of plain English words, whose meaning cannot

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be misunderstood, and the Equity Gas Light Company has been in default in respect thereto, not merely for three years, but for eighteen years. (Laws of 1848, chap. 37, § 18; *People v. N. R. R. Co.*, 53 Barb. 98; *N. A. Co. v. Barlow*, 63 N. Y. 62; *More v. S. Ins. Co.*, 7 Paige, 294; *People v. Bowen*, 30 Barb. 24.) The People's action, upon the facts set forth in the complaint, is maintainable in equity, as a matter of common law. (*Kelsey v. King*, 32 Barb. 416; *Van Brunt v. Town of Flatbush*, 128 N. Y. 55, 56, 57; *Lahr v. M. E. R. R. Co.*, 104 id. 292; *Barney v. Keokuk*, 94 U. S. 340; *Story v. E. R. R. Co.*, 90 id. 155; *Crook v. F. W. W. Co.*, 29 Hun, 246; *Ogden v. Gibbons*, 4 Johns. Ch. 150; *Atty.-Genl. v. C. Co.*, 6 Paige, 135; *People v. T. A. R. R. Co.*, 45 Barb. 63; High on Injunctions, § 826; Wood on Nuisances, § 80; *People v. Ballard*, 134 N. Y. 293.) This action and the judgment herein are plainly authorized by the present Code. (Code Civ. Pro. §§ 1948, 1955; *People v. Ballard*, 134 N. Y. 269.)

BARTLETT, J. The appeal is from a judgment of the general term of the City Court of Brooklyn, affirming an interlocutory judgment of the special term, overruling demurrer of the defendant, the Equity Gas Works Construction Company, to the complaint in this action.

This is a suit in equity brought by the attorney-general, upon his own information, to restrain the defendants from opening the streets of the city of Brooklyn and laying gas pipes therein. The complaint alleges the incorporation of the defendant, the Equity Gas Light Company, under an act of 1848, entitled "An act to authorize the formation of gas light companies;" also that its rights and powers were modified by chap. 144, Laws 1874; that certain streets, described, in the city of Brooklyn are public highways of the state of New York, and are so used and occupied; that the said Equity Gas Light Company has no right to lay pipes in any of said streets, for the reason that its corporate powers long since ceased by failure to commence the transaction of its business within the period prescribed by law; that defendant, the Equity Gas

Works Construction Company, claims the right to lay said pipes under a contract with the Equity Gas Light Company; that the defendant Devlin claims the right to lay said pipes by virtue of being an officer of said Equity Gas Light Company; that the Equity Gas Light Company and its officers are claiming the right through said Construction Company and Devlin to lay said pipes; that the claims and threats of the gas light company and of the other defendant are made under and by virtue of the articles of incorporation of said, the Equity Gas Light Company and the act of 1874, and that if the defendants are allowed to proceed great injury will be done to the highways of the People of the state and a nuisance created by the tearing up of the pavements, making the trenches and laying the pipes therein. The prayer for relief is that the defendants, and each of them, be enjoined and restrained from committing the said acts.

On the argument the counsel for the People devoted much time to a very able discussion of three questions, viz.: *First*, was the forfeiture under the charter of the Equity Gas Light Company self-executing; *second*, if so, had the corporation incurred the penalty of forfeiture by reason of failure to organize and commence the transaction of its business as required by law; and *third*, did the act of 1874 relieve the company from this forfeiture. Under the disposition we feel constrained to make of this case it is unnecessary to pass upon any of these questions. We are of opinion that this action cannot be regarded as brought under any of the provisions of the Code of Civil Procedure.

The court below held, and the counsel for the People in his argument here contended, that this action is maintainable under section 1948 of the Code of Civil Procedure, subdivision 3. The general term stated this conclusion was reached after some hesitation.

Section 1948 provides when quo warranto can be maintained as follows, viz.: "The attorney-general may maintain an action upon his own information or upon the complaint of a private person in either of the following cases: * * *

"3. Against one or more persons who act as a corporation within the state without being duly incorporated, or exercise within the state any corporate rights, privileges or franchises not granted to them by the law of the state."

It is obvious from the bare reading of this section that the case at bar is not within its provisions. The section contemplates an action against individuals and not against corporations. This case is not in the nature of a quo warranto, but is a suit in equity to restrain the commission of an alleged nuisance by a corporation, its contractor and officer.

It is not averred that the Construction Company and Devlin are acting as a corporation without being duly incorporated, or are exercising any corporate rights, privileges or franchises not granted to them by the law of the state, but, on the contrary, it is specifically alleged that the Equity Gas Light Company, the Construction Company and Devlin are claiming to act under and by virtue of the articles of incorporation and the act of 1874. The present action must, therefore, be treated as a suit in equity to restrain the commission of an alleged nuisance.

The learned counsel for the People urged that if this action could not be sustained under section 1948 of the Code, subdivision 3, it is maintainable in equity, as a matter of common law. This brings us to the question in the case we regard as controlling.

It is familiar law that the People can maintain a suit in equity to abate a public nuisance in the highways of this state when the circumstances of the case show it involves the public safety or convenience. It is equally true that a court of equity will not interfere when the matter can be dealt with effectually by the local officials, to whom the state has delegated a portion of its authority.

This was held in *Attorney-General v. Metropolitan Railroad Co.* (125 Mass. 515).

The court said: "The jurisdiction of a court of equity to abate an existing or prevent a threatened nuisance, upon information filed by the attorney-general, is limited to those public

nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition. (*Attorney-General v. Tudor Ice Co.*, 104 Mass. 239.) The nuisance must be clearly established. (*District Attorney v. Lynn & Boston R. R. Co.*, 16 Gray, 242.) And the court will not interfere where the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. (*Attorney-General v. Bay State Brick Co.*, 115 Mass. 431, 438.)

“There must be a want of adequate sufficient remedy and the injury to public rights must be of a substantial character and not a mere theoretical wrong.”

This same principle is sustained by the English cases. In *Attorney-Genl. v. The Sheffield Gas Consumers' Company* (3 De Gex, M. & G. 304) it was held that the disturbance of a pavement in a town by an unincorporated gas company for the purpose of laying down gas pipes was not such a nuisance as to warrant an injunction either upon a bill or upon an information.

In the case at bar the People have abundant remedy without coming into a court of equity.

The state has delegated to various officials acting under the present charter of Brooklyn ample power to protect and maintain the streets of that city.

We are, therefore, of opinion that the facts in this case do not warrant the intervention of the equitable powers of the court and the complaint must be dismissed as to the appellant, the Equity Gas Works Construction Company.

Judgment reversed and complaint dismissed as to defendant, the Equity Gas Works Construction Company, with costs.

All concur, except O'BRIEN, J., taking no part.

Judgment accordingly.

THE PEOPLE ex rel. LAWRENCE D. HUNTINGTON et al., Appellants, v. JOHN J. CRENNAN as Justice, etc., Respondent.

Under the provisions of the act for the preservation of fish and game (§§ 238, 240, chap. 488, Laws of 1892), as amended in 1893 (Chap. 578, Laws of 1893), fines as well as penalties for violations of the act are required to be paid over to the board of commissioners of fisheries, not to the county treasurer.

The amendment has a retroactive effect, and as such is constitutional. The moneys collected are in no sense the private property of the county, and hence it is not deprived of private property by the amendment.

A mandamus, however, may not be issued on the relation of said board to compel a justice of the peace to pay over fines collected by him, as the relator has an adequate remedy at law, and that is the remedy provided by the statute.

(Argued January 29, 1894; decided February 6, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which affirmed an order of Special Term denying an application for a writ of peremptory mandamus.

The relators, the Board of Commissioners of Fisheries of the State of New York, applied for a writ of peremptory mandamus to compel defendant to pay over to them moneys collected by him as a justice of the peace for fines imposed for using purse nets in Long Island sound.

The facts, so far as material, are stated in the opinion.

Edward G. Whitaker for appellants. The amendment of 1893 is not unconstitutional, and it was not beyond the power of the legislature to deprive the county of this fund. Fines imposed for the commission of crimes belong to the People of the state. (*In re Gertum v. Bd. Suprs.*, 109 N. Y. 170; *People ex rel. v. Bd. Suprs.*, 67 id. 109.) As an abstract question of legislative power, the legislature by appropriate language could have compelled the county to pay a sum certain out of its treasury to the commission of fisheries. (*Darlington v. City of New York*, 31 N. Y. 163; *People ex*

rel. v. Common Council, 50 id. 525; *People ex rel. v. Bd. Suprs.*, 13 id. 143; *People ex rel. v. Suprs.*, 70 id. 228; *Howell v. City of Buffalo*, 37 id. 267; *In re Van Antwerp*, 56 id. 261; *People v. Alden*, 112 id. 117.) Section 238, as amended in 1893, should be retrospectively construed. It contains express retrospective words. (*People v. McGloin*, 91 N. Y. 250; *People v. Matsell*, 94 id. 179-183.) The law requires the fines to be paid to the commission at the time they were imposed by and paid to defendant. (*Laws of 1888*, chap. 577, § 4; *People v. H. Ins. Co.*, 92 N. Y. 328.) The proper and only complete remedy is mandamus, inasmuch as an action at law, which section 238 authorizes, would afford no adequate remedy. (*People ex rel. v. Mead*, 24 N. Y. 114; *McCullough v. Mayor, etc.*, 23 Wend. 460; *People ex rel. v. Green*, 2 T. & C. 62; *People ex rel. v. Brown*, 55 N. Y. 180; *People ex rel. v. Comptroller*, 77 id. 45.) The case is properly entitled. The board of fish commissioners is not a corporation, consequently the proceeding is properly brought in the name of each of them as relators. (*People ex rel. v. D. & C. R. Co.*, 58 N. Y. 152; *People ex rel. v. Allen*, 1 Lans. 248.)

J. F. Coffin for respondent. The granting or refusal of a writ of mandamus is within the discretion of the court of original jurisdiction, and where it does not appear that the discretion has been abused the Court of Appeals will not interfere to review the proceedings. (*In re Dederich*, 77 N. Y. 595; *In re Sage*, 70 id. 220; *People v. Campbell*, 72 id. 496; *People v. Ferris*, 76 id. 326; *People v. Jeroloman*, 139 id. 14.) A peremptory writ of mandamus will not be granted unless it appears that the applicant has a clear and unquestioned legal right to the relief asked for. (*People v. MacLean*, 25 Abb. [N. C.] 470; *St. Stephen's Church Cases*, Id. 242; *People v. Newton*, 34 N. Y. S. R. 584; *People v. Suprs.*, 11 N. Y. 563; *People v. Hawkins*, 46 id. 9; *People v. N. Y. I. Asylum*, 122 id. 190; *People v. State Board of Cannassers*, 129 id. 360; *People ex rel. v. Assessors*,

etc., 137 id. 205.) The relators were not entitled to these fines, and the motion for a mandamus was properly denied by the court below. (*Dash v. Van Kleeck*, 7 Johns. 499; *Jackson v. Van Zandt*, 12 id. 167; *Sayre v. Wisner*, 8 Wend. 662; *People v. Suprs.*, 10 id. 363; *Palmer v. Conly*, 4 Den. 376; *Berkley v. Rampacher*, 5 Duer, 183; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 N. Y. 473; *People v. O'Brien*, 111 id. 60.) The construction for which the relators contend would make the amendment unconstitutional. (Code Civ. Pro. § 726; Laws of 1893, chap. 573; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 N. Y. 477.) This proceeding cannot be maintained because the relators have a legal remedy by action at law. (*People v. Suprs.*, 11 N. Y. 573; *People v. Board of Apportionment*, 65 id. 627; *People v. Campbell*, 72 id. 496; *People v. Thompson*, 99 id. 641; *People v. N. Y. I. Asylum*, 122 id. 190; *People v. Miller*, 39 Hun, 565; 114 N. Y. 636; *People v. Green*, 66 Barb. 630.)

EARL, J. During the summer of 1892 a large number of persons were arrested by the state game and fish protector for using purse nets in the west end of Long Island sound, within the boundaries of Westchester county, contrary to the provisions of section 135 of chapter 488 of the Laws of 1892. They were taken before the defendant, who was a justice of the peace in that county, and were by him severally fined, and they paid their fines to him, amounting in all to upwards of \$1,000. He retained the money, being in doubt whether he should pay it to the county treasurer of Westchester county or to the relators, and he refused upon their demand to make payment to them. Thereafter, in April, 1893, they obtained an order from a judge of the Supreme Court directing the defendant to show cause why a peremptory writ of mandamus should not issue against him, requiring him to pay the money to them. Upon the return of that order and the hearing of the motion, the judge denied the motion, but without prejudice to the right of the relators to renew it. They claimed

the money under the following sections of the act above referred to, to wit:

"Section 238. The recovery and costs in all actions heretofore brought and remaining undetermined, or hereafter to be brought under the direction of the chief protector or a commissioner in the name of the People, shall be paid to the board of commissioners and such money shall be by it distributed as hereinafter provided.

"Section 239. One-half of the recovery in all actions heretofore brought, or hereafter to be brought, by an individual or society in his or its name shall be paid to the board of commissioners to be by it disposed of in the same manner as other moneys received by it, and it shall be the duty of the person in whose hands such moneys shall come to pay over the same, and in case of failure so to do, such moneys may be recovered from the person receiving the same in an action brought in the name of the People under the direction of the chief protector or the commissioners.

"Section 240. There shall be paid out of the funds received by the board of commissioners one-half of the *finer* and penalties collected in an action by the People, to the protector or special protector upon whose information the action was brought; such moneys shall be paid on the certificate of the chief protector that such protector is entitled thereto; such certificate shall be final.

"Section 241. The remaining money received by the board of commissioners shall be applied to the payment of the expenses of actions for violation of this act on the certificate of the chief protector.

"Section 242. The board of commissioners shall include in their annual report to the legislature a detailed report of their receipts and disbursements under this article."

The motion was denied, as we suppose, because these sections did not require expressly or by implication the payment of *finer* to the relators, the claim of the defendant being that they required only the payment of the money recovered in actions brought for *penalties*. Thereafter, by the act, chapter

573 of the Laws of 1893, passed May 4th of that year, sections 238 and 240 were amended so as to read as follows:

"Section 238. The amount of fines imposed or penalties recovered and collected in all actions, settlements, compromises or proceedings hereafter or heretofore brought under the direction of a commissioner or upon the order of the chief protector in the name of the People shall be disbursed by said board as hereinafter provided. Any officer or person failing to pay over any such money recovered by him shall be guilty of a misdemeanor and shall be removed from office, and a civil action may be brought against any such officer or person for the recovery of any such money received by him in the name of the People, under the direction of either of the commissioners.

"Section 240. The commissioners shall dispose of the fines and penalties received by them as follows: They shall deduct all the expenses incurred in the inquisition or collection of such fines or penalties, and shall pay one-half of the remainder to the protector or special protector upon whose information the action was brought. Such payment should be made on the certificate of the chief protector that such protector is entitled thereto, and the certificate of the chief protector shall be final."

The relators then renewed their motion for a mandamus before the same judge, and he denied it on the ground that it was beyond the power of the legislature to deprive the county of Westchester of the fine money to which it was entitled under the law as it stood before the amendment of 1893. The relators then appealed to the General Term, and there the decision was affirmed, apparently on the ground that the amendments of 1893 could not have retroactive effect so as to change the title to the money then in the hands of the defendant.

There is no express provision in section 238 as amended requiring the fines to be paid to the commissioners of fisheries, but we think such payment is fairly and indeed necessarily implied. It is clear to us that the amendment of section 238

was made to put penalties and fines on the same footing, requiring them both to be paid to the commissioners. There could have been no purpose or policy to have the penalties take one direction and the fines another. Whatever may be said of the fines, the penalties recovered by action were, under section 238, prior to its amendment, required to be paid to the commissioners, and it cannot be supposed that the legislature intended by the amendments that now both penalties and fines should go to the county treasurer, under section 726 of the Code of Criminal Procedure, to be used and applied contrary to the policy of the state as manifested in all the previous acts upon the subject. (Laws of 1879, chap. 534, sec. 35; Laws of 1888, chapter 577, sec. 4.) Now the moneys realized from fines and penalties are to be mingled together into one fund and are to be disbursed by the commissioners. How could they disburse the moneys unless they were paid to them? It is made a misdemeanor for any officer or person not "to pay over" such moneys. To whom is payment to be made if not to the commissioners? And payment may be enforced by the commissioners in an action brought by them in the name of the People. The sections cannot have full force and effect and the law cannot be fully administered unless the moneys received for both fines and penalties are paid to the commissioners. All the provisions of a statute must be consulted so as to ascertain the legislative intent, and whatever is necessarily implied in a statute is just as much a part thereof as if written therein. (*People v. Utica Ins. Co.*, 15 Johns. 358; *Riggs v. Palmer*, 115 N. Y. 506.)

But it is said that section 238 as amended cannot have retroactive effect, and our attention is called to many authorities which illustrate the rule that statutes are to be so construed as to give them prospective operation only if that is reasonably possible. But these authorities and the rule they establish have no application, because here the legislative intent is plainly manifested that this section shall have retroactive operation. To hold otherwise, we would have to eliminate the word "heretofore," which is used in contrast with the word

"hereafter," from the section. (*Shreveport v. Cole*, 129 U. S. 36; *People ex rel. Collins v. Spicer*, 99 N. Y. 225.)

But the further contention is made that if the section was intended to have retroactive effect, it is unconstitutional, as depriving the county of Westchester of its property in the money without due process of law. The county, prior to the amendment of section 238, had no equitable or meritorious claim to this money. It was in no way produced or brought into existence by it or any of its agents. It did not even come from the taxation of any of its inhabitants. It came from the criminal violation of the general laws of the State, and assuming that it was payable under the law of 1892 to the county, it was made so payable by a general law. Whatever right the county had to it was not such as an individual has to his private property. The county would take it for a public use under the laws of the state. It can hardly be said even that the county would take it at all. The county treasurer would take it to be disbursed as the laws direct. Until it was actually disbursed the legislature could direct by laws duly enacted the purposes for which it was to be used. It could even direct its payment into the state treasury to be mingled with the other moneys of the state, or it could direct its payment to any officer or agent of the state to be used for public purposes. The legislature could go further and compel payment out of the county treasury of all the expenses attending the enforcement of the game and fishery laws within the county limits. Still more could it arrest this money in the hands of the justice of the peace and thus prevent its payment to the county treasurer. The money was in no sense the private property of the county, and, hence, the county was not deprived of private property by the amended section.

We, therefore, see no reason to doubt that this money was payable to the fisheries commissioners, and we announce this conclusion because the questions bearing upon it were fully argued, and both parties seem desirous that the statute should be construed now so as to save further litigation.

But, nevertheless, this order must be affirmed. A man-

damus could not be issued in this case upon the facts now appearing without a departure from a fundamental and important rule of law always observed in such cases, and that is that such a writ will not be issued where the relator has an adequate remedy by action. (*People v. Supervisors of Chenango Co.*, 11 N. Y. 573; *People v. Campbell, Comr.*, 72 id. 496; *People v. Thompson, Comr.*, 99 id. 641.) Here the very remedy provided by the statute for the recovery of this money is an action, and there is no reason to doubt that that remedy will prove in this case to be entirely adequate and effectual.

The order must, therefore, be affirmed, but under the circumstances, without costs of the appeal to this court.

All concur.

Order affirmed.

EDWARD H. CHISHOLM, Respondent, v. THE STATE OF NEW YORK, Appellant.

While, in an action for negligence, the absence of negligence on the part of the plaintiff, contributing to the injury, must be shown by him affirmatively, this may be done by circumstantial as well as direct evidence, and if different conclusions may be drawn from the circumstances proved, the question of negligence is one of fact for the jury or a trial court.

The state erected a new highway bridge over the Erie canal, which, being wider than the old one, rendered a widening of the approaches necessary. The approach at one end was not graded up to the bridge for some days, and thus a hole was left which was unsafe and dangerous, without proper guards. No guards or lights were furnished, and plaintiff, in crossing the bridge on a very dark night, stepped into the hole and was injured. Upon a claim presented to the Board of Claims it appeared that plaintiff was not aware of the dangerous condition of the approach. *Held*, that the facts showed negligence on the part of the state and justified a finding that there was no contributory negligence on the part of the claimant.

(Argued February 1, 1894; decided February 9, 1894.)

APPEAL from an award of the Board of Claims made December 29, 1891, in favor of the claimant.

The facts, so far as material, are stated in the opinion.

T. E. Hancock, Attorney-General, for appellant. There is no evidence in the case tending to show that the state was negligent in respect to the claimant, or that the negligence of the state caused or contributed to the injury complained of. (*Bedlow v. N. Y. F. D. D. Co.*, 112 N. Y. 263.) There was no proof offered by which the Board of Claims could find that the claimant was free from negligence contributing to the injuries complained of, even assuming that the state was negligent. (*Murray v. T. & W. T. B. Co.*, 91 N. Y. 659; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 248; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 id. 330; *Weston v. City of Troy*, 139 id. 281; *Dobbins v. Brown*, 119 id. 188; *Splittorf v. State*, 108 id. 217; *Peaslee v. Latham*, 69 Hun, 389; *Dubois v. Kingston*, 102 N. Y. 223.)

James W. Watts for respondent. The liability assumed by the state rests upon the same principles as that of an individual. (Laws of 1870, chap. 321, § 1; Laws of 1883, chap. 205, § 13; *Sipple v. State*, 99 N. Y. 284; *Bowen v. State*, 108 id. 166; *Gibney v. State*, 137 id. 1.) On appeal from the decision of the Board of Claims only questions of law are open for consideration. (*Bowen v. State*, 108 N. Y. 166.) This bridge was a part of a public highway, and the state owed to all persons using it the same duty that a municipal corporation or an individual owes to persons using streets and sidewalks, viz., to keep it and its approaches in a safe and passable condition. (*McGuire v. Spence*, 91 N. Y. 303; *Weed v. Ballston*, 76 id. 329; *Nolan v. King*, 97 id. 565-572; *Storrs v. Utica*, 17 id. 104.) Even though plaintiff knew of the obstruction (which in this case he clearly did not) it is a question of fact whether he was guilty of carelessness which contributed to the injury, and this fact has been found in his favor. (*Bullock v. Mayor*, 99 N. Y. 654; *Evans v. City of Utica*, 69 id. 166; *Weed v. Village of Ballston*, 76 id. 329; *Button v. H. R. R. R. Co.*, 18 id. 248; *Hart v. H. R. B. Co.*, 80 id. 622; *Hoffman v. U. F. Co.*, 47 id. 176-186; *Nowell v. City of New York*, 20 J. & S. 382; *Johnson v.*

H. R. R. Co., 20 N. Y. 65-70; *Jones v. N. Y. C. & H. R. R. Co.*, 92 id. 628; 10 Abb. [N. C.] 200; 28 Hun, 304; *Moody v. Osgood*, 54 N. Y. 488-496.) The excavation in the highway being unnecessarily left as long as it was left, became a nuisance, and in such case contributory negligence is not a defense. (*Irvine v. Wood*, 51 N. Y. 224.)

BARTLETT, J. This appeal is taken by the state of New York from an award made by the Board of Claims in favor of the claimant for personal injuries sustained May 21st, 1889.

The claimant at the time of the accident was a resident of the town of Whitestown in the county of Oneida. For several years prior to 1889 a public highway leading from Yorkville to New York Mills in said town was carried over the Erie canal on a bridge constructed and maintained by the state.

In the spring of 1889 the state removed the bridge and replaced it with one made of iron. This new bridge was six or eight feet wider than the old one, and this fact necessitated the widening of the approaches.

The approach at the northeast corner was not graded up to the bridge for some days after the work in other respects was completed, and a hole was left which rendered said corner unsafe and dangerous and without proper guards and protection.

The accident happened while this state of affairs existed. At about nine o'clock in the evening of May 21st, 1889, the claimant, a young man twenty-four years old, approached said bridge from the south and crossed it on the easterly side to the northeast corner where he stepped into the said hole and was precipitated to the canal bank below, a distance of about ten feet, fracturing a rib and sustaining other severe and possibly permanent injuries. There is abundant evidence to establish that the state was guilty of the grossest negligence in leaving the bridge in the condition already described without proper guards and lights to warn the wayfarer of his danger.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

The night of the accident was very dark; one of the witnesses testified "it was darker than pitch."

The attorney-general insisted there was no proof offered by which the Board of Claims could find that the claimant was free from negligence contributing to the accident, and that the finding to the contrary was legal error. It was urged on the argument that it was the duty of claimant to have shown whether he was walking or running, whether he was under the influence of liquor or sober, or whether he was exercising due care under the circumstances.

Although it is a fundamental principle that the absence of negligence on the part of the plaintiff, contributing to the injury, must be affirmatively shown by him, yet this may be done by direct proof, or by circumstances. (*Hart v. Hudson River Bridge Co.*, 80 N. Y. 622; *Hoffman v. Union F. Co.*, 47 id. 176-186; *Button v. Hudson River R. R. Co.*, 18 id. 248.)

If different conclusions can be drawn from these circumstances it is a question for the jury, or in this case for the commissioners.

The attorney-general cited the recent decision of this court in *Weston v. The City of Troy* (139 N. Y. 281) as a conclusive authority in his favor.

That case illustrates the distinction between the case at bar and many of the cases cited by the attorney-general.

The proof showed that the plaintiff, Mary Weston, while walking on one of the streets of Troy in the forenoon of a March day, slipped and fell by reason of stepping on a ridge of ice that was plainly visible although covered by an inch or two of light snow. A verdict in her favor was reversed because there was no evidence as to the exercise by her of any care on the occasion.

Chief Judge ANDREWS remarked in the course of his opinion "that the presumption which a wayfarer may indulge, that the streets of a city are safe, and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious."

In the case at bar we have a state of facts which distinguishes it from the case just cited. Claimant was proceeding along a public highway on a very dark night; he was not required to avoid defects or obstructions which he could not see.

In *Harris v. Uebelhoer* (75 N. Y. at page 175), Chief Judge FOLGER remarked: "A public highway may be used in the darkest night; a night so dark as that the keenest and clearest vision might not be able to detect obstacles and defects. In such a case any man traveling upon it is practically a blind man." One passing along a sidewalk has a right to presume it is safe. (*McGuire v. Spence*, 91 N. Y. 303; *Weed v. Ballston*, 76 id. 329; *Brusso v. Buffalo*, 90 id. 679.)

We are of opinion that the evidence fully sustains the findings of the commissioners that the state was negligent and the claimant was not.

It was also proved that the dangerous condition of the northeast corner of the bridge was not known to claimant.

Great stress was laid upon the fact that the claimant testified that he did not know how he fell; he stated under cross-examination: "I think I stepped down one of the steps; after that I did not know anything until I was picked up down on the ground."

It was insisted that claimant's lack of knowledge on this point led to a failure of proof as to how he came to be lying at the bottom of this excavation ten feet in depth.

We do not so regard it, but, on the contrary, consider that the claimant's testimony, taken in connection with all the evidence in the case, leads irresistibly to the conclusion that he, without negligence on his part, on a dark night fell into an excavation that the state, through its servants, had left directly in his path, wholly unguarded, in a public highway over which he was lawfully traveling.

The award is affirmed, with costs.

All concur.

Award affirmed.

THE PEOPLE ex rel. THE EDISON GENERAL ELECTRIC COMPANY, Appellant, v. EDWARD P. BARKER et al., Commissioners of Taxes, etc., Respondents.

The provision of the Revised Statutes prohibiting a corporation from declaring dividends, except from surplus profits (1 R. S. 589, § 1), does not apply to a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848); the trustees of such a corporation have power to declare and pay dividends, at least until some judicial restraint intervenes to prevent, although there are no surplus profits, and in so doing simply subject themselves to the penalty imposed by the act (§ 18).

Where, in proceedings by certiorari to review the action of the commissioners of taxes and assessments of the city of New York, in assessing such a corporation, it appeared that the assessment was based solely upon statements of the relator in answer to questions put by the commissioners, which statements showed that the capital was impaired and that the indebtedness of the company exceeded the value of its assets exclusive of real estate, and did not disclose any fact or circumstance justifying a disbelief of the answers made, except that a dividend had been declared and paid shortly previous, *held*, that this did not authorize a disbelief in the statement of the impairment of capital, and, in the absence of any request on the part of the commissioners for further information, did not justify them in imposing a tax, as the statements, if accepted as true, showed that there was no basis therefor.

(Argued January 9, 1894; decided February 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 10, 1893, which affirmed an order of Special Term dismissing a writ of certiorari brought to review the action of the commissioners of taxes and assessments of the city of New York in assessing and taxing the relator.

The relator is a corporation organized under the General Manufacturing Act, with a capital stock actually paid in, or secured to be paid in, of \$14,964,900, and was assessed by defendants for the year 1892 at \$15,000,000. The relator applied, under section 820 of the Consolidation Act, to have the assessment corrected, and submitted to defendants statements in writing in answer to questions of the commissioners,

141	251
144	102

141	251
146	314

141	251
j165	824

141	251
78	AD*315
78	AD*316

which were sworn to by its treasurer, and were substantially as follows:

" Total gross assets, exclusive of patent rights, value unknown.....	\$9,459,500
" Capital stock actually paid in, or secured to be paid in	14,964,900
" Rate of dividend for last year.....	8%
" Indebtedness, investments in real estate and stocks of other corporations.....	13,676,634 "

Defendants thereupon reduced the assessment to \$2,670,000.

Charles E. Miller for appellant. The relator is a corporation to which the provisions of the Revised Statutes are not applicable. (Const. art. 8, § 1; Laws of 1857, chap. 422, § 7.) The provision in the Revised Statutes that it shall not be lawful for the directors to make dividends, except from the surplus profits arising from the business of the corporation, is not contained in the act of 1848. The object of this provision is to prevent the dissipation of the fund designed for the security of creditors. (*Rorke v. Thomas*, 56 N. Y. 559, 564.) A corporation of the nature of relator may lawfully declare and pay dividends out of the profits of its business, although its gross assets are less in value than its capital stock. (2 R. S. [8th ed.] 1554; *Morawetz on Corp.* §§ 440, 441; Laws of 1853, chap. 333, § 2; Laws of 1854, chap. 232.) In the statement of gross assets submitted to the tax commissioners the franchise, good will and dividend earning capacity of the relator are not included. But these are all proper items in estimating the value of the property of a corporation in deciding upon the propriety of payment of dividends. (*People v. Coleman*, 126 N. Y. 437; *People v. Comr. of Taxes*, 103 id. 240; *Karnes v. R. & G. V. R. R. Co.*, 4 Abb. [N. S.] 107.) The doctrine of *stare decisis* is applicable. (*People v. Barker*, 139 N. Y. 55.) The indebtedness, \$4,740,174, must, in the nature of things, be taken into consideration in arriving at the value of the capital of the relator.

(*People v. Barker*, 139 N. Y. 63.) The assessed valuation of the real estate, \$802,000, is also to be deducted. (Laws of 1875, chap. 456, § 3.) The amount invested in stocks of other corporations which are taxed upon their capital, \$3,526,800, is to be deducted. (2 R. S. chap. 13, § 1; *People v. Comrs. of Taxes*, 4 Hun, 595; 62 N. Y. 630; *People v. Comrs. of Taxes*, 5 Hun, 200; 64 N. Y. 541; *People v. Campbell*, 138 id. 543.) Eleven million, one hundred and eighty-four thousand, nine hundred and seventy-four dollars, being \$1,399,474 more than the value of the gross assets, inclusive of \$326,000 of patent rights, should be deducted. (*People ex rel. v. Comrs. of Taxes*, 4 Hun, 595; 23 N. Y. 223; *People ex rel. v. Barker*, 139 id. 126.) The patent rights are not assessable. (*McCullough v. State*, 4 Wheat. 316; *Weston v. City of Charleston*, 2 Pet. 449; *Patterson v. Kentucky*, 97 U. S. 501; *Holmes v. F. N. Bank*, 43 Ind. 167; *Cranson v. Smith*, 37 Mich. 309; *Holiday v. Hunt*, 70 Ill. 109; *Crittenden v. White*, 23 Minn. 24.)

David J. Dean for respondent. The return does not show that the decision of the commissioners upon the value of the relator's assets was unsupported by the evidence before them, and, therefore, that decision cannot be set aside. (*M. F. Ins. Co. v. Comrs. of Taxes*, 76 N. Y. 64; *People ex rel. v. W. F. Ins. Co.*, 91 id. 580; *People v. Aster*, 100 id. 600; *People ex rel. v. Comrs. of Taxes*, 104 id. 246; *People v. K. F. Ins. Co.*, 107 id. 543; *People ex rel. v. Hicks*, 105 id. 198.)

FINCH, J. We are unable to distinguish this case from that of *People ex rel. v. Barker* (139 N. Y. 55). In both cases the returns of the tax commissioners were identical except as to the respective amounts and values, and showed that the assessments rested upon the statements of the relators made in answer to questions put by the assessors: in both those statements established that there was no basis for a tax if they were accepted as true: in both the value of patents was described as unknown, but the cost in stock issued was disclosed: and in both there was developed no fact or circumstance justifying a disbelief of the answers made, except that

in each case a dividend had been declared at some possibly recent period. In this case the dividend was eight per cent, and in the earlier case four per cent, and we there declared the fact of a dividend paid to be immaterial under the existing circumstances. The legitimate effect of such a fact upon the action of the assessing officers was not then much considered, but is now put in the front of the controversy, and claimed to furnish a decisive reason for the disbelief of the assessors in the statement furnished by the relator.

We might safely rest upon the authority cited, but since the point now urged was not then seriously argued or discussed, and is pressed specially upon our attention, we deem it proper to give it some degree of consideration. It proceeds upon an inference or presumption. The argument is that under the Revised Statutes any declaration of a dividend except out of surplus is forbidden, since otherwise the capital is necessarily impaired by the distribution to stockholders: that no such violation of the law is to be presumed, but rather a due compliance with its terms: that a presumption of such compliance arises from the fact of a dividend declared and paid, and so the lawful and necessary inference is that the capital has not been impaired, but that over and above it the necessary surplus had been accumulated: that such inference is inconsistent with and contradicts the statement made, showing the actual capital to have fallen from fifteen millions to about one-third of that amount: and so the commissioners had a right to disbelieve that statement and fix the value of the capital upon their own judgment. There are two answers to this contention, one of which questions the presumption, and the other at least balances and nullifies it.

In the first place, the relator was incorporated under the general act of 1848, and the prohibition of the Revised Statutes does not apply. That general act has its own prohibition and attaches its own sole and peculiar penalty, and one which leaves the companies in the matter of making dividends with an equal if not greater liberty. (*Excelsior Co. v. Lacey*, 63 N. Y. 422.) That penalty, and the only one imposed, is that the

trustees shall become liable for all debts existing and contracted during their term of office, (Laws of 1848, chap. 40, § 13), and the practical effect follows that for the security of creditors the liability of the trustees is put in the place of the impairment of capital effected by the dividends. If the trustees choose to bear that responsibility they have power to declare and pay the dividend though no surplus exists beyond the capital, at least, until some judicial restraint intervenes to prevent. It is probable that many such dividends are declared and paid, and their declaration in a given case scarcely justifies an inference that the capital necessarily remains intact and undiminished in actual value. The presumption if it exists is extremely slender and weak.

But what there is of it is rebutted by another presumption springing from the facts which is that against the commission of fraud or crime. Here the treasurer of the company has sworn to a shrinking of the capital from fifteen millions to about nine millions, further chargeable with nearly five millions of debts, and obviously could not have honestly made that statement if in truth there had been no shrinkage of values at all, and so the two possible presumptions may be said to balance and neutralize each other.

These suggestions serve to show that the duty of the tax commissioners is not to subordinate facts, fairly disclosed and uncontradicted, to the influence of presumptions amounting to little more than a guess or possibility, but to deal with them fairly and intelligently. These officers are armed with power to ascertain the truth of answers given to their formal inquiries, and should always do so when the means of investigation are put before them. Here the facts for which they asked, and all that they asked, were furnished under the oath of the relator's treasurer. If they were dissatisfied with his valuation of assets in gross they could have required them to be given in detail and so been enabled to judge of the fairness or unfairness of the valuation; but they were not justified in assuming that the treasurer, for the purpose of evading taxation, had falsely underestimated the assets, because of a recent divi-

dend, the declaration of which did not necessarily involve the fact of an unimpaired capital. I think, therefore, that we were right in saying in the case cited that the declaration of a dividend even if sufficiently recent is an immaterial circumstance where the actual facts are furnished to the full extent required which show the real amount and value of the capital. Those facts may be investigated, but must not be disregarded to make room for doubtful presumptions.

The orders of the General and Special Terms should be reversed, without costs.

All concur.

Orders reversed.

141	256
d148	304
141	256
d154	146

WILFRED F. MILLS, Appellant, v. EDMUND T. SMITH, as
Executor, etc., Respondent.

Where the loss of a testamentary trust fund is caused by the waste or misconduct of the executor and trustee, no claim for contribution arises against the residuary legatees.

It seems, such legatees are liable to refund in case they have been paid from the estate without a decree authorizing the payment, and in consequence there is a deficiency of assets to discharge prior claims or to pay other legatees, but in the absence of collusion or fraud on their part, they take the payment without other risk.

By the will of M. a sum was given to his executors to be held in trust for the benefit of T. during life, the trust fund to be invested in bonds and mortgages, and upon his death to be distributed among his children. In an action by the sole surviving child of T., brought after his death, to compel the residuary legatees to account, and to pay the amount of the trust fund, it appeared that there had been a final accounting by the executors, and at that time the amount of the trust fund was in their hands in bonds and mortgages, which were held by them as the trust fund, and no part thereof was ever paid to the residuary legatees. Neither T. nor plaintiff were cited to appear upon the accounting. By the surrogate's decree thereon, the executors were credited with the amount of the trust fund. *Held*, that in the absence of proof of any fraudulent conversion or combination on the part of the residuary legatees whereby the trust fund was affected or divested, no claim was established against them; that the trust fund having been invested and set apart as prescribed by the will, and the trust being in that condition at the time of the decree, the irregularity in not citing plaintiff and T. did not render

the distribution of the residuary estate invalid; that plaintiff's interest was simply in the trust fund, and he had no concern in the distribution of the residue; that for any breach of duty upon the part of the executors and trustees his remedy was against them, not against the distributees.

(Argued January 20, 1894; decided February 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 29, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are set forth in the opinion.

George H. Hart for appellant. The plaintiff is an infant legatee, and special *cestui que* trust, and one, therefore, interested in the estate, and as such was a necessary party to all the proceedings in the Surrogate's Court, and entitled to all notices thereof, and the decree of the surrogate settling the accounts of the executors and directing distribution of the assets of the testator's estate was void and of no effect as to the plaintiff because he received no notice of such proceeding, was not cited to appear therein and was not represented by a special guardian duly appointed by the surrogate. (*Leach v. Wells*, 48 N. Y. 598; *Fisher v. Banta*, 66 id. 472, 480; *Wilson v. White*, 109 id. 59; *Hood v. Hood*, 85 id. 577; *Carr v. Bennett*, 3 Den. 433; *Elsworth v. Hinton*, 4 N. Y. Supp. 573; 47 Hun, 625; *In re Quinn's Estate*, 9 N. Y. Supp. 550; *Davis v. Crandall*, 101 N. Y. 321; *Kellett v. Rathburn*, 4 Paige, 166; Redf. L. & Pr. Surr. [4th ed.] 93, 94; *Thompson v. Pickney*, 26 Hun, 525; *In re Brown*, 19 N. Y. S. R. 895.) The decree procured through misrepresentation and fraud practiced upon the court is utterly void, and no right can be founded thereon. All the assets distributed among the defendants under pretense thereof are tainted with fraud. (*Mander ville v. Reynolds*, 68 N. Y. 543; *Stillwell v. Carpenter*, 2 Abb. [N. C.] 238, 263; Herman on SICKELS—VOL. XCVI. 33

Estoppel, § 116; Story's Eq. Juris. § 207; *Franklin Bank v. Cooper*, 36 Maine, 180; *In re Hawley*, 104 N. Y. 260; *Ward v. Town of Southfield*, Id. 293; *C. B. Co. v. Haas*, 111 id. 176; *Beard v. Travers*, 1 Ves. Sr. 313; *Fulmouth v. Strude*, 11 Mod. 137; *Williams v. Blunt*, 2 Mass. 213; *Hall v. Blake*, 13 id. 153; Code Civ. Pro. § 499.) The decree of the surrogate is an utter nullity for any purpose even as between the parties appearing in the proceedings, and all the acts performed by virtue thereof in respect to the distribution of the assets before and after it was made are utterly illegal, void, ineffectual and no rights can be founded thereon, and its validity may be collaterally impeached. (*Roderigas v. E. R. S. Inst.*, 76 N. Y. 316; *McNaughton v. Chave*, 5 Abb. [N. C.] 228; *Jackson v. Robinson*, 4 Wend. 442; *Ketchum v. City of Buffalo*, 14 N. Y. 367; *Kissam v. Hamilton*, 20 How. Pr. 369; *Rerault v. Sackett*, 17 id. 461; *Putnam v. Crombie*, 34 Barb. 232; *Crain v. Libbie*, 32 Minn. 491; *In re Underhill*, 117 N. Y. 494; *Riggs v. Craig*, 89 id. 479; *Wilcox v. Smith*, 26 Barb. 336; *Taylor v. Walker*, 1 Heisk. 734; *In re Quinn's Estate*, 9 N. Y. Supp. 550; *Beekman v. Bingham*, 5 N. Y. 366; *In re Willets*, 112 id. 296; *In re Carmon*, 3 Redf. 46; *Layton v. Davison*, 29 Hun, 622; *Johnson v. Lawrence*, 95 N. Y. 154; *Ward v. Ford*, 4 Redf. 45.) All the defendants are liable for the \$20,000 bequeathed to the plaintiff, and he is entitled to a judgment against each severally for the payment of the whole of that sum. (*Wood v. Brown*, 34 N. Y. 343; *Foster v. Wilber*, 1 Paige, 440; *Colt v. Lasmier*, 9 Cow. 320; *Randel v. Dyet*, 38 Hun, 347; *Sacia v. Berthond*, 17 Barb. 15; *Campbell v. Sheldon*, 13 Pick. 22; *Rogers v. Zook*, 86 Ind. 243; *Hart v. Ten Eyck*, 2 Johns. Ch. 116; 3 Redf. on Wills [3d ed.], 157, 215; *Wilcox v. Smith*, 26 Barb. 354; *Orr v. Kaines*, 2 Ves. 194; *In re Gilman*, 41 Hun, 561; *Bennett v. Ives*, 30 Conn. 329; *Bryant v. Hilton*, 66 Ga. 477; *Gillespie v. Alexander*, 3 Russ. 130; Story Eq. Pl. [9th ed.] § 106; *Grieg v. Somerville*, 1 R. & M. 338; *McToskey v. Reid*, 4 Bradf. 339.) The intentions of the testator did not prevail. The \$20,000

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bequeathed in trust for the benefit of Theodore and his children was never satisfied, and even if the defendant intended to satisfy the trust for the benefit of Theodore the fund was not legally appropriated for that or any other purpose. The defendants divided among themselves the assets of the estate upon which was impressed the trust for his benefit, and they are each and every of them liable to him therefor. (*Smith v. Bell*, 6 Pet. 74; *Herbert v. Durant*, 88 N. Y. 124; *Collinson v. Lister*, 20 Beav. 370; *Boerum v. Schenck*, 41 N. Y. 188; *Lingke v. Wilkinson*, 57 id. 445; *Ackerman v. Emott*, 4 Barb. 649; *Bostwick v. Atkins*, 3 N. Y. 53; *Smith v. Bowen*, 35 id. 84; *Johnston v. Lawrence*, 95 id. 162; *Sherman v. Jerome*, 120 U. S. 319, 326; *Miller v. Congdon*, 14 Gray, 114; *Wilmott v. Jenkins*, 1 Beav. 401; *In re Willetts*, 112 N. Y. 289; *Wilcox v. Smith*, 26 Barb. 336; *Phœnix v. Livingstone*, 101 N. Y. 451; *Leitch v. Mills*, 48 id. 600; *Wilbourn v. Wilbourn*, 48 Miss. 43; *In re Hood*, 104 N. Y. 103; 18 Hun, 309; *Wetmore v. Porter*, 92 N. Y. 82; *Briggs v. Davis*, 20 id. 15; *Cromwell v. Kirk*, 1 Dem. 602; *Davis v. Crandall*, 101 N. Y. 307; Lewin on Trusts, 279; *Jordan v. Poillon*, 77 id. 518; *Mason v. Roosevelt*, 5 Johns. Ch. 542.) The residuary legatees, in collusion and combination with the executors, so unlawfully dealt with the estate of the testator as to deprive plaintiff of his legacy, which was a trust fund, and they are liable to him in damages therefor in a sum sufficient to satisfy his legacy and to compensate him for the loss thereby sustained by him. (*Harvey v. Keller*, 1 Dem. 577; *Fernbacher v. Fernbacher*, 4 id. 227; 8 Civ. Pro. Rep. 308; *Shields v. Shields*, 60 Barb. 56; *Schofield v. Churchill*, 72 N. Y. 566; *Evans v. Fisher*, 40 Miss. 685.) The defendants are estopped from denying that the bonds and mortgages, "or trust funds," were set apart for the benefit of Theodore only, and from claiming or asserting that these securities were set apart to satisfy the trust for the benefit of the plaintiff, because, at every stage of the proceedings of final accounting the defendant claimed that the pretended appropriation was for the benefit of Theodore only. (*Woodruff*

v. *Taylor*, 20 Vt. 65; *Markham v. Jaudon*, 93 N. Y. 249; *Westervelt v. Gregg*, 1 Barb. Ch. 478; *Boerum v. Schenck*, 41 N. Y. 193; *Douglas v. Cruger*, 80 id. 15; *Littlefield v. Barwell*, 5 How. 341; *Terry v. Munger*, 120 N. Y. 167; 49 Hun, 364; *M. Bank v. Hazard*, 30 N. Y. 226; *Boardman v. L. S., etc., R. Co.*, 84 id. 182; *Philip v. Gallant*, 62 id. 263; *Niven v. Belknap*, 2 Johns. 573; *Willy v. Judson*, 82 N. Y. 39.) The plaintiff has the right to recover a judgment against all the defendants, jointly and severally. (*Verplanck v. Van Buren*, 76 N. Y. 247; *Mandeville v. Reynolds*, 68 id. 528, 545; *Whittlesey v. Delany*, 73 id. 578; *Hutchings v. Hutchings*, 7 Hill, 107; *Wetmore v. Porter*, 92 N. Y. 80.)

Fred W. Hinrichs for respondents. If fraud and conspiracy fall out of the case there is no ground for recovery against the residuary legatees. The trustees alone are liable if the fund has been dissipated, of which there is no direct evidence. (*Lupton v. Lupton*, 2 Johns. Ch. 614; 1 Roper on Leg. 460.) The only point raised by plaintiff's counsel upon the trial was, not that the securities in question had not been set aside, but that it was the duty of the executors to set aside a sum of cash, and then invest the cash in bond and mortgage. It was further contended that as the respondents had allowed a distribution to themselves and others of all this cash, they had in fact applied to their own use the \$20,000 cash which should have been invested in bonds and mortgages under the trust. This is untenable. (Schouler on Ex. & Adm. [2d ed.] § 328; Perry on Trusts [4th ed.], § 448; *Orr v. Newton*, 2 Cox's Cas. 274.) The exceptions in connection with the "offers to prove" are untenable. (*Coulson v. Whiting*, 14 Abb. [N. C.] 60; *L. Co. v. Colby*, 120 N. Y. 640.)

GRAY, J. William Wickham Mills, by his will, gave to his executors the sum of \$20,000, in trust "to loan the same on bond and mortgage upon real estate and to apply the net income thereof, at their discretion, to and for the use of his son, Theodore Mills, during his natural life, and, upon his

decease, to divide, etc., etc., among the children of said Theodore, etc." Testator died in January, 1865. The plaintiff, the sole surviving child of testator's son, Theodore, was born in November, 1865. The will was admitted to probate in January, 1865, and letters testamentary were issued to the persons named as executors, to wit : To Eliza A. Mills, testator's widow, and to Washington Mills and William W. Mills, two of testator's sons. Theodore, the plaintiff's father, died in January, 1886. Plaintiff, upon attaining his majority in November, 1886, demanded of William W. Mills, the then sole surviving executor of the testator, the fund given in trust for his father, Theodore Mills ; but the executor was unable to respond to plaintiff's demand and, as it appears, was insolvent. Plaintiff then brought this action ; making the residuary legatees under the testator's will, or their legal representatives, parties defendants. His complaint is based upon various charges of unlawful conduct and fraudulent acts by the defendants and others of testator's children, since deceased, in matters connected with the administration of the testator's estate. Those relating to the admission of the testator's will to probate and to the appraisal of the testator's property are unnecessary to consider. He charged that the defendants unlawfully contrived to prevent the legacy bequeathed to the plaintiff from being discharged by the surrogate and from being invested upon bond and mortgage, as required by the will ; that they unlawfully caused the surrogate to settle the accounts of the testator's executors, with the effect of defrauding the plaintiff out of his legacy ; that the executors failed to appropriate and to invest the sum of \$20,000, as provided by the said will, and, finally, that they, with intent to defraud the plaintiff, unlawfully combining together, distributed all of the testator's estate among themselves, in disregard of the plaintiff's rights. Resting upon these charges, the plaintiff claims to be entitled to compel the residuary legatees to account as for moneys fraudulently appropriated and distributed to them and to have them satisfy his claim to the trust fund of \$20,000 thereout. Upon the trial, proof was given of certain proceedings, which

took place after testator's death, with reference to the probate of his will, to the appraisement of his estate and to settlements of his executor's accounts. Beyond that documentary proof, the only other evidence was in the testimony of the defendant William W. Mills, the sole surviving executor. The trial judge found as facts, that, at the time of the accounting by the executors and of the surrogate's decree thereupon, the trust fund of \$20,000, invested in bonds, secured by mortgages, as required by the will, was in the hands of the executors and held in trust by them; that no part of the same was ever paid to the residuary legatees; that there was no evidence assailing the correctness of the accounts, or to show any conspiracy, combination, or consent to defraud the plaintiff, or to misapply the trust fund. Upon such and other findings the trial judge dismissed the complaint, and his conclusions have been sustained by the General Term. We think the learned judge could have come to no other conclusion upon the proofs. There is not a particle of evidence to sustain any of the allegations of fraudulent conduct in the residuary legatees, or to show any diversion of the trust funds into their hands. This action is simply an attempt to fasten upon the distributees of testator's residuary estate the responsibility for the subsequent default of the executors, as trustees for plaintiff's father. That cannot be done. Where the loss of a fund is due to the waste, or misconduct, of the executor and trustee, he and his estate alone can be looked to. No claim for contribution arises against residuary legatees in such a case. They are liable to refund in a case where, having been paid from the estate, it is discovered that there is a deficiency of assets for distribution under the will, caused by the diminution of the estate through the premature payment of legacies.

It may be perfectly true when, in 1871 and 1872, proceedings were had for an accounting by the executors, which resulted in a decree of adjustment and distribution, that the plaintiff and his father should have been cited to appear and that, for the want of such citation, or of an appearance, the proceedings and decree as to them were irregular and of no bind-

ing force. But admitting to the fullest extent this plaintiff's rights to complain of that defect, that fact, however otherwise available against the executors, does not furnish any support for the present action. If there was the omission to cite his father, or him, or to cause his appearance by guardian, it may have been a serious irregularity; but it, in no wise, furnishes any basis for imputing to the residuary legatees any fraudulent intention. They were not called upon to verify the regularity of the procedure and nothing connects them with a purpose to deceive plaintiff and his father, with respect to the accounting. In the accounts filed upon that accounting, it was shown that bonds and mortgages, representing in the aggregate the amount of \$20,000, and particularly described, were held as a trust fund for Theodore Mills, plaintiff's father. The accounts of the executors were verified and were made the subjects of objections. Testimony was taken before the surrogate at some length. In the decree of the surrogate, as rendered upon that accounting, the executors are credited with the amount of the trust fund, as set apart for Theodore Mills. Neither in that proceeding for an accounting, nor in anything previously done between the executors and the parties interested in the estate, does anything appear which, in the slightest degree, tended to prove any collusion or conspiracy to injure the plaintiff or his father. To the contrary of any theory of a combination between the executors and the legatees, there is evidence to show that the former were held strictly to the performance of their duties. When we come to consider the evidence given by the surviving executor, at this trial, upon his examination by the plaintiff's counsel, we find him testifying that he received the mortgages and securities that were set aside for the trust fund by him for Theodore Mills; that he and his brother took them out of the safe and that his brother, Washington Mills, the deceased executor, then took charge of them. He does not explain what became of them; simply saying that he never did anything with them thereafter and never had any control over them. The inference of a devastavit is, of course, plainly deducible. All the evidence in the

case goes fairly to prove that the trust fund, created for the plaintiff's father, was invested, held and set apart by the executors and existed in that condition at the time of the rendition of the surrogate's decree. That being the proof, the plaintiff cannot be heard, as against the residuary legatees, who received their portions of the estate, pursuant to this decree, to say that, for the irregularity in the accounting proceedings, the distribution of the estate to them was wholly invalid and null and that they should refund sufficient to make good to him the amount of the lost trust fund. That result does not follow upon any such proof. The question, in which the plaintiff was interested, concerned the trust fund and when that is found to have been set apart and held by the executors out of the estate, it is no concern of his how the distribution was made of the rest of the estate to the residuary legatees. He is remitted to his remedy against the executor or trustee, and for any breach of duty or of trust on his part he is without any claim against the distributees of this estate. It is unquestionably essential to the security of the executor that, upon a judicial settlement of his accounts, all parties, interested in the estate and entitled to be heard, should be cited, and that all the proceedings shall be conducted, in material matters, as required by law. But with respect to payments made by an executor to legatees, regarded as advances, or without a decree authorizing them, they take without other risk than such as may arise by reason of an insufficiency of assets to discharge prior claims, or to pay other legatees with equal rights, when such payments are duly and regularly ordered to be made upon a judicial accounting. In the absence of any proof of a fraudulent connivance or combination on the part of the residuary legatees, whereby the trust fund appointed to be held for his father's life was affected or diverted; or of any proof to show that that fund was non-existent in the executor's hands and never was set apart and held as a trust, the plaintiff is without sufficient ground for an action against the distributees of the residuary estate to compel them to refund, merely because there was a failure to cause his appearance upon the proceedings for a

settlement, or some irregularity of procedure. His counsel's brief is very full in its reasoning and bristles with propositions relating to the necessity for the observance of the rules established by statute, in order to confer jurisdiction upon the court, or to give force to its decrees. We do not dispute them, in the main; but they do not touch this case. The difficulty in their application is that while they illustrate the effect of irregularities in proceedings before the surrogate and might be applicable as against the executors; or in a case where it is made to appear that the final distribution of the estate has been without regard to, and to the prejudice of prior claims upon the estate, they are not applicable in aid of an action like this; where the object is to compel the distributees to make good the amount of a trust fund; lost, presumably, through the misconduct of the trustee and, so far as the proof discloses, in no wise, through the acts of the residuary legatees.

We deem it unnecessary to continue the discussion. The opinion at General Term is very full in its review of the questions and sufficiently answers many of them we have not referred to. Nor have we overlooked other questions, raised upon exceptions to the rulings of the trial judge. In our opinion there was no error in such respects. The plaintiff utterly failed to establish any of the charges against the defendants of a fraudulent contrivance or combination, resulting in injury to his rights, and his complaint was properly dismissed.

The judgment should be affirmed, with costs.

All concur; ANDREWS, Ch. J., in result.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
THOMAS A. WELCH, Appellant.

The courts of the state have civil and criminal jurisdiction over the navigable waters within its limits, and, in the absence of any prohibition in the Federal Constitution or laws, persons and property thereon are subject to such jurisdiction.

The powers granted by the Federal Constitution are not exclusive unless they are made so in terms, or prohibited to the states, or are incompatible with the exercise of a concurrent jurisdiction.

As to crimes committed upon navigable waters within the state, if they are such as existed at common law, and are defined in the statutes of the state, while congress may exclude the jurisdiction of the state courts, in the absence of any such exclusion, that jurisdiction may be exercised, although congress has vested jurisdiction over them in the federal courts

To exclude the jurisdiction of the state courts over such crimes, the intention of congress so to do must be distinctly manifested, and the legislation relied upon for that purpose must be clear and unambiguous. No presumption that state authority is excluded arises from the mere fact that congress has legislated; there must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject.

Accordingly *held*, that the provision of the U. S. Revised Statutes (§ 5344) which declares that every person employed on any steamboat or vessel "by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed * * * shall be deemed guilty of manslaughter," and which provides a punishment therefor, "upon conviction thereof in any Circuit Court of the United States," did not exclude the courts of the state from jurisdiction over such an offense committed upon the Hudson river; that there was no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide, and that the provision of said statutes (§ 5328) declaring that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof," was to be construed as exempting from the operation of the provision (§ 711) declaring that the jurisdiction of the federal courts shall be exclusive over "all crimes, and offenses cognizable under the laws of the United States," the cases specified in the title which were punishable under the laws of the several states, at least such as were so punishable under state laws existing when the provision last mentioned was enacted

Where, therefore, defendant was convicted in a state court of the crime of manslaughter in the second degree upon evidence showing that, while acting as a duly licensed pilot in charge of a steam tug on the Hudson

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river, through his "willful misconduct, negligence and inattention to his duties," the tug collided with a yacht, causing the death of a person on board the yacht, *held*, that the state court had jurisdiction to punish defendant for the crime.

(Argued January 16, 1894, decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 20, 1893, which affirmed a judgment of the Court of General Sessions of the Peace in and for the city and county of New York entered upon a verdict convicting defendant of the crime of manslaughter in the second degree.

The facts, so far as material, are stated in the opinion.

Lorenzo Semple for appellant. The congress of the United States has declared the act charged against the defendant in the indictment to be an offense against the United States, and provided for the apprehension, trial and conviction of any person charged with the commission of the said offense. (*U. S. v. Wilson*, 3 Blatchf. 437; *U. S. v. Hall*, 8 Otto, 345; Whart. on Crim. Law, 76.) It is within the constitutional power of congress to confine to the courts of the United States exclusive jurisdiction over offenses arising under the laws of the United States. (*Clafflin v. Houseman*, 93 U. S. 130; *The Moses Taylor*, 4 Wall. 411.) The Judiciary Act of 1789 vested exclusive jurisdiction in the Circuit Court of the United States over all crimes and offenses cognizable under the authority of the United States, and the state courts could exercise no jurisdiction whatever over crimes and offenses against the United States unless where in particular cases the laws of the United States otherwise provided. (U. S. R. S. §§ 629, 711.) The jurisdiction vested in the courts of the United States in the case at bar by section 711 of the Revised Statutes of 1878 is exclusive of the courts of the several states. (U. S. R. S. § 5344; *People v. Fonda*, 62 Mich. 401; *Comm. v. Felton*, 101 Mass. 204; *Ex parte Dock Bridges*, 2 Woods [U. S.], 423; *Brown v. United States*, 14 Am. Law Reg. 536;

Ex parte Houghton, 7 Fed. Rep. 657; *Cross v. State of North Carolina*, 132 U. S. 132; *C. N. Bank v. Morgan*, Id. 141; *United States v. Buskey*, 38 Fed. Rep. 99; *In re Loney*, Id. 101; 134 U. S. 372.)

John D. Lindsay for respondent. The claim that the Court of General Sessions of the Peace of the city and county of New York was without jurisdiction to try the offense of which the petitioner was there convicted is contrary to well-settled law. (Penal Code, §§ 51, 189, 193.) The case at bar, therefore, falls within a well-recognized class of cases in which the state courts and the United States courts exercise concurrent jurisdiction, the same act constituting an offense against the state and also against the Federal government. (*United States v. Marigold*, 9 How. [U. S.] 560; *Moore v. Illinois*, 14 id. 13; *Fox v. Ohio*, 5 id. 432; *Cross v. North Carolina*, 132 U. S. 131; *Ex parte Siebold*, 100 id. 371.) There is no force in the contention of the relator that the application of the rule would involve a violation of the constitutional provision, that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb." (*Ex parte Siebold*, 100 U. S. 389; *Blatchley v. Moses*, 15 Wend. 215; *Greenwood v. State*, 6 Baxt. 567; *State v. Gordon*, 60 Mo. 383; *C., etc., Co. v. City of Chicago*, 88 Ill. 221.) Section 711 of the Revised Statutes of the United States should not be construed so as to divest the state courts of jurisdiction in the case at bar. (Whart. on Crim. Law, §§ 351-355; *Fox v. Ohio*, 5 How. [U. S.] 410; *United States v. Marigold*, 9 id. 560; *Moore v. Illinois*, 14 id. 13; *Ex parte Siebold*, 100 U. S. 371, 390; *Cross v. North Carolina*, 132 id. 131; *In re Loney*, 134 id. 375; *Dashing v. State*, 78 Ind. 35.) In any view of the matter, congress has no power under the Constitution to divest the state courts of jurisdiction of such crimes as that in the case at bar. (*U. S. v. Bevans*, 3 Wheat. 336; *Smith v. Maryland*, 10 How. [U. S.] 71; *U. S. v. Durkee*, 1 McAllister, 196; *U. S. v. Wells*, 11 Am. Law Reg. [N. S.]

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424.) That the states of the Union did not grant to the United States exclusive jurisdiction over crimes of the nature of the one here under consideration, would seem to have been conceded at the time of the adoption of the Constitution. (*Martin v. Hunter*, 1 Wheat. 337.) Section 5344 of the Revised Statutes of the United States has no application to the case. (*Cross v. North Carolina*, 132 U. S. 131; *U. S. v. Reese*, 82 id. 214; *U. S. v. Harris*, 106 id. 629, 642; *Baldwin v. Franks*, 120 id. 678; *Trademark Cases*, 100 id. 82; *Virginia Coupon Cases*, 114 id. 270-304; *Leloup v. Port of Mobile*, 127 id. 647.)

ANDREWS, Ch. J. The defendant was convicted at the Court of General Sessions held in and for the city and county of New York, of the crime of manslaughter in the second degree, upon an indictment charging him with having, on the 15th of June, 1891, upon the Hudson river in said city and county, feloniously and willfully propelled and forced the steam tugboat "F. W. De Voe," upon which he then was, against the yacht "Amelia," on which was one Francis Jackson, thereby forcing the said Francis Jackson into the river, and causing his death by drowning. The record contains an agreed statement of the facts proved, in substance, that the defendant Welch was duly licensed to act as a second-class pilot on steam vessels by the United States local board of inspectors of steam vessels for the district of New York; that while said license was in full force, and while the defendant was engaged in the actual performance of his duties as pilot under said license, a collision occurred June 15, 1891, on the Hudson river in the county of New York, between the steam towboat on which the defendant was employed, and which at the time was under his control and management as pilot, and the sloop yacht "Amelia," which collision was caused by the willful misconduct, negligence and inattention to his duties on said "F. W. De Voe," of the defendant; that said collision so caused resulted in the sinking of the yacht "Amelia," and in the destruction of the life of Francis

Jackson, who was at the time on board of the yacht, by drowning.

The sole question presented on this appeal is as to the jurisdiction of a state court to entertain jurisdiction of the offense established by the evidence, the claim in behalf of the defendant being that the Federal courts have exclusive jurisdiction of the offense of which he was convicted. Sec. 5344 of the U. S. Revised Statutes is as follows: "Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed, and every owner, inspector or other public officer through whose fraud, connivance, misconduct or violation of law the life of any person shall be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court of the United States shall be sentenced to confinement at hard labor for a period of not more than ten years."

It is plain that the circumstances found bring the case within this section. The defendant was a licensed pilot. He was in charge of the steam tugboat as pilot at the time of the collision. The collision which resulted in the death of Jackson was caused by the misconduct, negligence and inattention to his duties of the defendant, and, moreover, his misconduct was, as the jury found, willful, an element which does not seem to be necessary to constitute the crime defined in the statutes of the United States. In the consideration of the question of the jurisdiction of the state court there are certain indisputable propositions which it is important to bear in mind. The Hudson river is within the territory of the state of New York, and is subject to its legislative jurisdiction. The criminal laws of the state apply to offenses committed on the waters of the river, whether above or below the ebb and flow of the tide, to the same extent as to like offenses committed upon the land, except in so far as the laws of Congress, under the Constitution of the United States, have asserted an exclusive jurisdiction. In *United States v. Bevans* (3 Wheat. 336) the defendant had been indicted and convicted of murder

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in the United States court of Massachusetts, committed on board of a man of war of the United States in Boston harbor, he being at the time a marine on the vessel. The conviction was reversed by the Supreme Court of the United States on the ground that the place where the murder was committed was within the territorial limits of Massachusetts, and that as no law of Congress had made a murder within the territorial jurisdiction of a state, on tide water or elsewhere, an offense against the United States, the state court alone had jurisdiction. In *Smith v. Maryland* (18 How. U. S. 71), Mr. Justice CURRIE, referring to the grant of admiralty and maritime jurisdiction in the United States Constitution, said: "We consider it to have been settled by this court, in *United States v. Bevens*, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of a state, over so much of their territory that lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or the laws of the United States." The rights of a state to exercise jurisdiction over navigable waters within its limits, and to subject persons and property thereon to the civil and criminal jurisdiction of its courts, in the absence of any prohibition in the Federal Constitution or laws, has passed unchallenged, and is an undoubted incident of sovereignty.

Another proposition also beyond question is that the crime of which the defendant was convicted is one defined by a statute of the state of New York, and that independently of any statute the facts established the crime of manslaughter at common law. The Revised Statutes, after defining the crime of murder and what shall constitute the crime of manslaughter in the higher degrees, proceeded to declare (2 Rev. St. 662, § 19): "Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in the act to be murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree." It is scarcely necessary to cite authorities to show that the statute above

quoted was simply declaratory of the rule of common law, that a killing of a human being by culpable negligence is manslaughter. (Wharton's Crim. Law, §§ 361-5, and cases cited.) The courts of this state on the adoption of the State Constitution of 1777, became vested with the jurisdiction over offenses cognizable at common law, and this jurisdiction is unimpaired and in full force except in so far as it has been modified by state legislation, or was surrendered to the United States by the Federal Constitution, or has been taken away by act of Congress lawfully enacted in execution of the powers conferred by that instrument. It is an accepted canon in the construction of powers granted to the general government by the Federal Constitution that state authority existing when the constitution was adopted is not excluded by the mere grant of similar powers to Congress. The powers granted by the Federal Constitution are not exclusive, unless made so in terms, or prohibited to the states, or are incompatible with the exercise of a concurrent jurisdiction. But the principle has been grafted upon the subject that although powers conferred by the constitution upon Congress are not in terms or in their nature exclusive of the power of the states, they may be made so by national legislation excluding the jurisdiction of the states in the particular matter, although within their original and antecedent authority. In *Martin v. Hunter* (1 Wheat. 304) Judge STORY, referring to the judicial power of the United States, said: "It is manifest that the judicial power of the United States is unavoidably in some cases exclusive of all state authority, and in all others may be made so at the election of Congress." The Judiciary Act of 1789 (U. S. Stats. at Large, vol. 1, ch. 20) was framed upon this construction of the power of Congress, and the jurisdiction of the courts of the United States was in some cases made exclusive, and in others the jurisdiction of the state courts not being in terms excluded, was left unaffected and was concurrent with the courts of the Union as to matters over which the state courts could, by their own powers and constitution, exercise jurisdiction. A distinction has been

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suggested as to the power of Congress to make the jurisdiction of the United States courts exclusive, between cases in which the state courts had jurisdiction antecedent to the adoption of the Constitution, and those where the right involved or the liability incurred arises exclusively under a law of Congress, and without which it would have had no existence. (See Curtis on Const. § 141.) But the recent cases of "*The Moses Taylor*" (4 Wall. 411), and *Clafin v. Houseman* (93 U. S. 130) seem to be adverse to the distinction suggested and to hold that it is competent for Congress to exclude the jurisdiction of the state court in respect of all subjects upon which Congress may legislate. In "*The Moses Taylor*" it seemed to be conceded that the proceeding there under review was a matter as to which the original states through their courts could have exercised jurisdiction antecedent to the adoption of the Federal Constitution, and the decision was placed on the ground that the jurisdiction was excluded by force of the ninth section of the Judiciary Act of 1789, and vested exclusively in the district courts of the United States. (See 1 Kent Com. 400.) But it is obvious that to exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, the intention of Congress to exercise this power should be distinctly manifested and that the legislation relied upon to deprive the state courts of jurisdiction should be clear and unambiguous. There can be no presumption that state authority is excluded from the mere fact that Congress has legislated. There must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject. (See Curtis on Const. § 121.)

It must, we think, be conceded that section 5344 of the Revised Statutes of the United States was in its general purpose and enactment within the power of Congress, under the constitutional grant of power to "regulate commerce with foreign nations and among the several states" (Art. 1, § 8), and the grant of judicial power in cases of "admiralty and maritime jurisdiction" (Art. 3, § 1), and the authority vested

in Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in Congress by the Constitution (Art. 1, § 8, sub. 17). The Hudson river is within the admiralty jurisdiction of the United States. (*The Genesee Chief*, 12 How. U. S. 443.) The power to regulate commerce extends to the persons who conduct navigation as well as to the instruments used, and the United States courts may be invested by Congress with jurisdiction over offenses committed upon waters within the admiralty jurisdiction. (*Cooley v. Port Wardens of Philadelphia*, 12 How. U. S. 299; *United States v. Coombs*, 12 Pet. 72; Curtis on Const. § 47.) The legislation of which sec. 5344 is the culmination had its origin in the act of Congress of July 7, 1838 (5 U. S. Statutes at Large, p. 304), entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." It was extended by the act of Feby. 28, 1871 (16 U. S. Statutes at Large, p. 456, § 57), and the provision in its present form was enacted in the revision of 1873, and forms sec. 5344 of title 70 of the United States Revised Statutes, entitled "Crimes." The power of Congress to enact rules for the government of vessels on waters within the admiralty jurisdiction; to prescribe the qualifications and duties of captains, pilots and other persons employed thereon; to supervise the construction of steam vessels, with a view to secure the safety of passengers and others; to require licenses to be obtained by those engaged in navigation, and the inspection of steam boilers at recurring intervals, has been exercised without challenge, and a large body of rules covering these and cognate subjects have been enacted by Congress, or under its authority, and are to be found in the Revised Statutes of the United States. The power to enact rules on a specified subject carries the power to enforce penalties for their violation. The primary purpose of sec. 5344 was to secure, by criminal sanctions, the observance by owners, officers, employees of vessels, inspectors and other public officers, of the duties imposed upon them in connection with the business of navigation for the security of

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human life. Whether the section has, as is claimed, a broader application than is justified by the power of Congress, we deem it unnecessary to consider. We have no doubt that, as applied to licensed officers or pilots, the enactment does not transcend its power.

It remains to consider whether the offense defined in the section is exclusively punishable in the courts of the United States. The states do not enforce the criminal laws of the United States. (*U. S. v. Lathrop*, 17 Jo. 4.) The state in punishing the defendant is not enforcing a statute of the United States. It is enforcing its own laws, which had an existence coeval with the formation of the State Constitution. The crime of which the defendant was convicted was primarily a crime against the peace and good order of the state. It was only a crime against the United States, because Congress, in the interest of navigation, had seen fit to enact a law making one species of homicide, when committed by an officer, pilot, etc., manslaughter punishable in the courts of the United States. There is nothing in the enactment itself which makes the jurisdiction exclusive. There is no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide. The jurisdiction of the United States courts is not exclusive unless there is found elsewhere in the legislation of Congress, provisions of clear and unmistakable import, taking away the jurisdiction of the courts of the state. The principle that Congress may lawfully exclude the jurisdiction of the state courts of offenses punishable under federal statutes was first applied by sec. 11 of the Judiciary Act of 1789, which declared that the Circuit Courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides or the laws of the United States shall otherwise direct." The jurisdiction of the state courts to punish under state laws offenses which are cognizable by the Circuit Courts of the United States was made by this section to depend upon affirmative legislation by Congress,

giving the state courts concurrent jurisdiction. Subsequent to the act of 1789 laws were passed by Congress punishing the counterfeiting of the current coin of the United States and the uttering of the same. (Ch. 49, Laws of 1806; ch. 75, Laws of 1807; ch. 44, Laws of 1816; ch. 65, Laws of 1825.) These acts contain the following provision: "And be it further enacted that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this act." In 1847 the question whether the courts of Ohio could entertain jurisdiction under the laws of that state of the offense of passing counterfeit current coin of the United States, came before the Supreme Court of the United States in the case of *Fox v. State of Ohio* (5 How. [U. S.] 410) upon writ of error, after the conviction of the defendant in the state court of that offense. It was urged that the proviso in the Federal statutes above referred to did not affect the exclusive jurisdiction of the United States courts under sec. 11 of the Judiciary Act of 1789. The Supreme Court sustained the jurisdiction of the state court, and the decision necessarily adjudged that the proviso in these statutes was a law of the United States, excepting cases of passing counterfeit coin from the clause in the act of 1789, giving exclusive jurisdiction to the United States courts of offenses cognizable under the laws of the United States. Mr. Justice WASHINGTON in *Houston v. Moore* (5 Wheat. 26) gave the same construction to the proviso in the acts referred to. The case of *United States v. Marigold* (9 How. U. S. 560) brought into question the jurisdiction of the courts of the United States to punish the crime of passing counterfeit coin, under the Federal statute, and in this case also the jurisdiction was affirmed. The two cases of *Fox v. State of Ohio* and *United States v. Marigold* established the proposition that the same act may be an offense both against the state and the United States and punishable in each jurisdiction under its laws. The same principle has been declared in other cases. (*Moore v. Illinois*, 14 How. U. S. 13; Chief

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Justice TANEY, *U. S. v. Almy*, Quarterly Law Journal, July, 1859; *Ex parte Siebold*, 100 U. S. 371.)

Sec. 5328 of the United States Revised Statutes, which is one of the general provisions of tit. 70, entitled "Crimes," declares: "Sec. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Later on in this title is sec. 5344, making the misconduct, negligence or inattention to his duties of a captain, pilot, etc.; manslaughter. The provision as to exclusive jurisdiction contained in sec. 11 of the Judiciary Act of 1789, is incorporated in substance into the United States Revised Statutes in the 20th sub. of sec. 629, which declares that the Circuit Courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it may be otherwise provided by law."

If the question of the jurisdiction of the state courts in the present case depends solely upon the construction of the clause in sec. 629, just quoted, and of sec. 5328 of the United States Revised Statutes, there could be little ground, under the decisions of the Supreme Court of the United States, construing the proviso in the Counterfeiting Acts, for denying such jurisdiction. Sec. 5328 is in legal effect a re-enactment of the proviso in those acts applicable to the crimes mentioned in title 70 of the Revised Statutes of the United States. The proviso in the Counterfeiting Acts was held to withdraw the crimes therein mentioned from the operation of the 11th section of the Judiciary Act of 1789, and to create an exception to the general rule declared in that section, excluding the jurisdiction of the state courts of offenses cognizable in the courts of the United States. The same construction, applied to sec. 5328, would make the jurisdiction of the state courts of the offense now in question, concurrent. But the confusion and uncertainty attending the subject is produced by another section of the Revised Statutes of the United States, first enacted at the time of the revision, being section 711. That section declares, "The jurisdiction vested in the courts

of the United States in the cases hereinafter mentioned, shall be exclusive of the courts of the several states: First, of all crimes and offenses cognizable under the laws of the United States." Construing this section upon its language alone and without reference to the other sections mentioned, it would exclude the jurisdiction of the state courts over the offense of manslaughter committed by a pilot or other person employed on vessels, under the circumstances mentioned in section 5344. If such construction is imperatively required, it would result in the apparent anomaly of leaving to the state courts jurisdiction of the crime of murder committed on board of a vessel on navigable waters within the territory of the state, whether by an officer, pilot or other person, and depriving them of jurisdiction of the crime of manslaughter, defined in section 5344. If the defendant had murdered Jackson, the state court would have had undoubted jurisdiction of the crime. Manslaughter is one of the grades of criminal homicide. Can it be reasonably supposed that Congress, by an act which was primarily intended to enforce the observance, by persons engaged in navigation, of the rules it had established for the security of life and property, intended further to oust the jurisdiction of the state courts over one grade of the offense of manslaughter, of which they before had undoubted jurisdiction, and where the offense, whether committed by a pilot or any other person, was primarily an offense against the state? It was made an offense against the United States also, by reason of the relation in which the offender stood to the United States, under its rules and regulations, which he was bound to observe. We think sec. 5328 must be construed as exempting from the operation of sec. 711 the cases specified in title 70, which were also offenses punishable under the laws of the several states. Under sec. 711, the states could not enforce the criminal statutes of the United States, as was attempted in substance under the law of Pennsylvania, involved in *Houston v. Moore* (5 Wheat. 7). Nor, under sec. 711, could a state make an act criminal and punishable in its courts, which in its nature was an offense only, because made so by a

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law of Congress. Section 5328 may perhaps be construed as confining the concurrent jurisdiction of the state courts, of offenses specified in title 70, to such offenses as were such under the laws of the states existing when that section was enacted, leaving the section to operate to prevent future legislation by the states concerning the crimes mentioned in that title, not before cognizable under state laws. But whatever may be the true construction of that section, to give it the broad application claimed, would, we think, ignore the true scope or meaning of sec. 5328, interpreted in the light of the previous decisions of the Supreme Court of the United States. We are not satisfied with the view taken in some of the Circuit and District Courts of the United States, that sec. 5328 was intended merely to permit a state court to punish a different offense involved in the same act. Such a distinction is very difficult to apply, and it grafts on the section a qualification of its general language. Many of the crimes specified in title 70 are, in their nature, exclusively offenses against the United States. Such offenses are withdrawn from state jurisdiction, because they are not and cannot be offenses against a state. We have seen that where the exercise of state authority is incompatible with the exercise of Federal authority granted by the Constitution of the United States, the state authority is superseded without express words. This principle applies as well to judicial as to legislative powers. (Federalist, No. 82, by Hamilton.) It was upon this principle, as we understand, that it was held by the Supreme Court of the United States (*In re Loney*, 134 U. S. 372), that a state court had no jurisdiction to punish perjury, committed in a contested election case, of a member of the House of Representatives, under a proceeding regulated by a law of the United States. The learned justice who delivered the opinion in that case, after stating that the power of punishing a witness for perjury in a judicial proceeding belongs peculiarly to the government in whose tribunals the proceeding was had, said: "It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses

should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded," etc. The cases of *People v. Fonda* (62 Mich. 401), and *Com. v. Felton* (101 Mass. 204), held that the state courts have no jurisdiction of the crime of embezzlement by an officer of a national bank of the funds of such bank. It is sufficient to say that the offense of embezzlement, under the National Bank Acts, was subject to the provisions of section 11 of the Judiciary Act, and is not one of the crimes exempted from its operation by sec. 5328 of the Revised Statutes of the United States. The contention that sec. 711 excludes the state courts from jurisdiction of all crimes enumerated in title 70, if sustained, takes from the state courts the power to punish the passing of counterfeit money of the United States, a convenient jurisdiction which they have exercised from the commencement, and which, as was assumed by Mr. Justice GRAY, in the case *In re Loney*, still exists.

Upon the whole case we are of opinion that the state court had jurisdiction to punish the defendant for the crime proved. Its jurisdiction has not, we think, been taken away by the legislation of Congress. It would be a more satisfactory state of this law than now exists if it could be held that the court first acquiring jurisdiction should retain it, and that the judgment of one court in such a case as this could be pleaded in bar of a further prosecution for substantially the same offense in the courts of the other jurisdiction.

The judgment and conviction should be affirmed.

All concur.

Judgment affirmed.

CATHERINE S. HUNTER, Respondent, v. THE MANHATTAN
RAILWAY COMPANY et al., Appellants.

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144	178
141	281
148	355

In an action instituted in 1889 to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interests of her co-tenants, who also assigned to her their rights of action and claims for damages. Plaintiff claimed for damages sustained prior to March, 1887, as well as since. On the trial defendants moved that the action be severed and that the claim for damages acquired by assignment be sent to a jury, this was denied. *Held*, no error, that if the court decided that the claim for equitable relief was well founded, it was within its discretion to assess all the damages sustained to which plaintiff was entitled, whether belonging to her as owner or acquired by assignment, and that defendants had no absolute right to have them determined by a jury.

The trial judge found that prior to the commencement of the action all the parties who were co-tenants with plaintiff duly assigned to her, for a valuable consideration, all their rights of action by reason of the diminution in value of the premises or the rental value by reason of the construction and maintenance of the road. To this finding the defendants excepted, "and separately to so much thereof as finds that the plaintiff ever took from her co-tenants an assignment for valuable consideration of any rights of action as therein stated." Upon appeal it was claimed by defendants that there was no evidence of assignment by certain of the former tenants in common. *Held*, that the point was not presented by the exception and so could not be considered.

In such an action expert evidence is admissible to show the general effects caused by the maintenance and operation of the road upon abutting and neighboring properties.

(Argued February 8, 1894, decided February 27, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 5, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alexander S. Lyman for appellant. The learned trial judge erred in denying the defendants' motion for a jury trial of the claim for rental damages held by the plaintiff by assignment, and incidental only to the ownership of her predecessors in title. (*Pappenheim v. M. E. R. Co.*, 128 N. Y. 436; *Griswold v. M. E. R. Co.*, 122 id. 102; *Williams v. N. Y. C. R. R. Co.*, 16 id. 97; 1 Washb. on Real Prop. 665; *Dupuy v. Strong*, 37 N. Y. 372; *Crippen v. Morse*, 49 id. 69; *Lynch v. M. E. R. Co.*, 129 id. 274; *Shepard v. M. E. R. Co.*, 131 id. 215; *Davis v. Morris*, 36 id. 569, 572; *People v. A. & S. R. R. Co.*, 57 id. 161, 174; *Wheelock v. Lee*, 74 id. 495, 500; *Brayton v. Sherman*, 119 id. 623; *Halpin v. P. Ins. Co.*, 118 id. 165; *Mackellar v. Rogers*, 109 id. 468; *Coleman v. Dixon*, 50 id. 572, 574.) The recovery is based upon evidence repeatedly condemned by this court as substituting the judgment of expert witnesses for that of the trial judge. (*McGean v. M. E. R. Co.*, 117 N. Y. 219; *Roberts v. N. Y. E. R. R. Co.*, 128 id. 455; *Doyle v. M. E. R. Co.*, Id. 488; *Gray v. Same*, Id. 499; *Kernochan v. N. Y. E. R. R. Co.*, 130 id. 651; *Becker v. M. E. R. Co.*, 131 id. 513; *Jefferson v. N. Y. E. R. R. Co.*, 132 id. 483.) The plaintiff was allowed to recover damages in this action suffered by other persons not parties to the action, and not secured to the plaintiff by assignment. This was error. (*Griswold v. M. E. R. Co.*, 122 N. Y. 102; *Briggs v. Boyd*, 56 id. 289; *Post v. Campbell*, 83 id. 279.)

Henry R. Beekman for respondent. The motion to dismiss the complaint on the ground that it stated no cause of action in equity was properly denied. (*Thompson v. M. R. Co.*, 130 N. Y. 360-363.) The indorsement made by the trial judge upon the defendants' proposed findings of fact and conclusions of law was sufficient. (Code Civ. Pro. § 1023; *McCullough v. Dobson*, 133 N. Y. 114; *Bank of Attica v. M. N. Bank*, 97 id. 639.) It was not claimed by the defendants that there was any special benefit to the property in suit by reason of the construction and operation of the defendants'

road. The defendants' proposed findings of fact that there was such benefit was, therefore, immaterial, and the court did not err in declining to find it. (*Bookman v. E. R. R. Co.*, 137 N. Y. 302; *Bischoff v. N. Y. E. R. Co.*, 138 id. 263; *Adler v. M. E. R. R. Co.*, Id. 173; *Livingston v. E. R. R. Co.*, Id. 76.) The defendant is liable to owners of property abutting upon the streets through which the railroad passes for damages caused by the construction and operation of its railroad, and it makes no difference whether such streets are opened under the act of 1813, reserved by the city under grants made of adjoining property, or were Dutch streets. (*Williams v. B. E. R. R. Co.*, 126 N. Y. 96; *Abendroth v. M. R. Co.*, 122 id. 1; *Kernochan v. N. Y. E. R. R. Co.*, 128 id. 559-563.) None of the defendants' exceptions to the admission of evidence was well taken. (*McGean v. M. R. Co.*, 117 N. Y. 219; *Roberts v. N. Y. E. R. R. Co.*, 128 id. 455; *Doyle v. M. R. Co.*, Id. 488; *Drucker v. M. R. Co.*, 106 id. 157.) The defendants' exception to the findings of fact as made does not raise the question as to whether the proof is sufficient as to the assignment of all the co-tenant's interests. (*McMahon v. N. Y. E. R. R. Co.*, 20 N. Y. 463; *Graham v. Chrystal*, 2 Abb. Ct. App. Dec. 263.)

GRAY, J. This is one of the many actions brought by property owners along the line of the elevated railroads in the city of New York, to obtain equitable relief by way of injunction, restraining their continuance, and an award of the damages sustained by their construction and operation. The plaintiff's property is situated upon Pearl and Water streets; having a frontage upon each street. The defendant's road is upon Pearl street. The plaintiff, prior to March, 1887, was seized of a one undivided third part of the premises; being tenant in common with a brother, two sisters and the children of a deceased sister. Upon the day mentioned, she acquired by purchase at public sale the interests of her co-tenants. Having thus become the sole owner of the premises, she instituted this action in 1889. She claimed in her complaint for

the damages sustained for a period of time prior to March, 1887, as well as since; alleging the execution of assignments to her by the other owners of the premises of their rights of actions and demands for damages. When the trial came on, the defendants moved that the action be severed and that the claims for rental damages acquired by assignment be sent to a jury for trial. The motion was denied and it is urged that the denial was error. As the action was one in equity, where the main relief sought was an injunction against the continuance by the defendants of acts in violation of the plaintiff's property rights, an award of damages, for what past injuries might be shown to have been inflicted, would follow as incidental to the main relief. In such an action, it is the settled rule that if the court decides that the claim for the equitable relief is well founded, it may proceed to assess the damages sustained, in its own discretion, and no absolute right exists to have them determined by a jury. (*Lynch v. Metropolitan E. R. Co.*, 129 N. Y. 274.) When the plaintiff brought her action, she represented in her person every interest in the property and if she were found and should be adjudged to be entitled to the equitable relief she demanded, in the exercise of the jurisdiction which it had acquired over the action, the court would have the right to assess the damages down to the time of trial, which had been suffered in the use of the premises. If they, as matter of fact and of law, then belonged to the plaintiff, of what consequence is it that they were not, during all the time for which they were awarded, hers to recover? The plaintiff was for all the time, for which a recovery of damages was permissible, an owner of the premises, with property rights for which she could demand protection and compensation. She became sole owner before the commencement of the action; possessing as such the right, solely, to demand the equitable interference of the court to protect the rights appurtenant to that property. In addition, she, through assignments of all demands, was legally entitled to recover and to receive whatever damages should be ascertained to have been sustained in the diminished enjoyment

of the property as a whole. There was no just reason for a severance of the claim and for sending so much of it as was held under assignment to a jury trial. Such a course would have been opposed to the principle upon which a court of equity proceeds in the disposition of a cause before it. In the *Shepard Case*, (117 N. Y. 442), the widow of a deceased tenant in common joined with the surviving tenants in common as plaintiffs, in a similar action. She was joined in her capacity as administratrix, claiming the past damages to the estate of her intestate; as well as in her individual right, as widow and claimant in dower. On demurrer to the complaint, it was insisted that she should not have been joined in her capacity as administratrix; as her cause of action, as such, was to recover the temporary damages, which her intestate had sustained in his lifetime and she had none arising out of the continuance of the road. But we held that though as administratrix she might have maintained a separate action at law, there was no objection to her presence in the action; that the object of the Code and the aim of equity were to avoid a multiplicity of actions and to effect a complete determination of all matters, which may come into controversy between the same parties, by one action; and that there was no reason why separate actions should be brought by those upon whom had devolved, and who, in their combined personalities, represented, the property interests of the intestate owner. Without greater elaboration of this point, I think the application of the principle of that decision is decisive of this contention.

The appellants further contend that the plaintiff was allowed to recover for damages suffered by other persons, not parties to the action, and not secured to the plaintiff by assignment. They say that the evidence was wanting of the assignments by certain of the former tenants in common. They are not in a position, however, to raise this point. The trial judge made the following finding of fact:

"That, prior to the commencement of this action, all the parties who were co-tenants with the plaintiff of the said premises prior to the 29th day of March, 1889, and had been

such co-tenants for more than six years prior to the day last mentioned, duly assigned and set over for a valuable consideration to this plaintiff all their right or rights of action against the defendants for or by reason of the diminution in value of the said premises or the rental value thereof by reason of the maintenance or construction by defendants of an elevated railroad past the said premises."

To this finding the defendants excepted as follows viz. :

"To the third finding of fact, and separately to so much thereof as finds that the plaintiff ever took from her co-tenants an assignment for valuable consideration of any rights of action as therein stated."

The exception is too general to be available in the present manner. The finding is very comprehensive as to facts and their legal effect, and the exception fails even to suggest the defect in proof now relied upon. If it was intended to raise the point that there were lacking in the case some assignments of their rights by the former part owners, the exception should have specifically so stated; in order that, attention being called to the fact, an opportunity might be afforded either to supply an inadvertent omission; or to remit so much of the award as the plaintiff lacked evidence of title to through assignment. The defendants might have raised the point by a request to find that the rights of action were not all assigned to the plaintiff; but, though they presented very numerous requests, there was no suggestion on this head. Nor are appellants aided, upon this point, by the exception to the conclusion of law "that the plaintiff was entitled to judgment for the sum of \$12,250, the amount of damages recoverable up to the time of trial by reason of the wrongful acts of the defendants, etc." The exception only raised the question whether such a legal conclusion directing judgment for the plaintiff followed upon the facts found. The exception should have specifically stated the ground of error now presented, for reasons previously stated, and not having been specific, it cannot now be resorted to to reverse this judgment.

Exceptions were taken to the admission of evidence. Wit-

nesses were examined for the plaintiff and shown to be expert in matters of real estate. One was asked the question: "In your judgment was there anything in the condition of Beaver and Water streets which should induce the upward rise in values greater than would have existed in Pearl street had there been no elevated railroad?" Another witness was asked: "Would the existence of such a structure and the running of trains as described affect the rental value of the property in front of which it was constructed?" The witness being allowed to answer that "It would affect the rental value;" he was then asked, "Would it affect it favorably or unfavorably in your judgment?"

The grounds of defendants' objections were that those questions called for the opinion of the witness on the point which the court was to pass upon. We think there was no error committed in overruling the objections. Within our decisions, in the course of this elevated railroad litigation, evidence is admissible to show the general effects caused by the maintenance and operation of the elevated roads upon abutting and neighboring properties. It is inadmissible to show what is the particular damage caused to the plaintiff's premises by the presence of the road; or to show what they would be worth, or what their rental value would be, without the road. Questions of this latter class have been held to be an invasion of the province of the court, or the jury; and the rule, as it is now laid down, rigidly excludes questions calling for the judgment of the witness upon the question which is to be submitted and decided. But questions of the former class are permitted, for the reason that the general effects upon other properties and the existence and nature of a general injury being shown to the court, or to the jury, they will be better enabled to infer the amount of the damage suffered in the particular case before them. The question for the tribunal in each case is, whether, by the construction and operation of the elevated railroad, there has been an intrusion upon the complainant's property rights to his actual prejudice and damage; and the determination of the question is to be made, not merely by

what may be shown with respect to the fee and rental values before and since the railroad came into the street, but upon a view of its general effects upon other abutting premises and upon the neighborhood. If it shall appear that the presence and operation of the elevated railroad have been prejudicial to, and have damaged, abutting properties, the part of the general loss, which is the complainant's, is to be estimated by the court, or by the jury, with such material in facts as they have and with such aid as the general view of the effect upon other properties, similarly situated, or furnishing a basis for comparison and for judgment, can furnish. Exceptions were taken by the defendants to the admission of certain evidence, upon the cross-examination of a witness called by them to testify in their behalf as to values and effects. We think the character of the evidence given upon his direct examination warranted the questions addressed to him upon his cross-examination and it is unnecessary to dwell upon the exceptions.

We find no errors committed upon the trial, which call for a reversal of the judgment, and the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. GEORGE D. FORSYTH, District Attorney,
etc., Respondent, v. THE COURT OF SESSIONS OF MONROE
COUNTY, Appellant.

A statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, after conviction, is not violative of the provision of the State Constitution (§ 5, art. 4) giving to the governor the power to grant reprieves and pardons.

The distinction between the two powers pointed out.

It seems, however, the legislature cannot authorize such courts to so limit the exercise of their discretion to inflict punishment when deemed proper, in a case where sentence has been suspended, as to make such exercise dependent upon compliance on the part of the person convicted with some condition that will require the court to try a question of fact before it can impose the punishment.

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Statement of case.

The provision of the Penal Code (§ 12) as amended in 1893 (Chap. 279, Laws of 1893), which declares that a criminal court, in certain cases, "may, in its discretion, suspend sentence during the good behavior of the person convicted," does not express such a condition, and does not preclude the court from passing the proper sentence whenever it appears to it to be proper.

- Where, therefore, a Court of Sessions, after a conviction of the crime of grand larceny, suspended sentence during good behavior, *held*, that this was within the jurisdiction of the court, and so that the granting of a writ of mandamus upon application of the district attorney, requiring said court to proceed to sentence and judgment, was error.

(Argued January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made January 18, 1893, which affirmed an order of Special Term granting an application for a writ of peremptory mandamus, the substance of which, and the material facts are stated in the opinion.

H. B. Hallock for appellant. The Court of Sessions had power to suspend sentence upon Attridge during his good behavior. [^] (*People v. Bradner*, 107 N. Y. 1; *In re Jennings*, 10 Hun, 301; *People v. Willett*, 102 N. Y. 251; Code Crim. Pro. §§ 22, 39; *Fuller v. State*, 1 Blackf. 66; *People v. Graves*, 31 Hun, 382; *People v. Whipple*, 9 Cow. 715; 1 Bishop's Crim. Pro. § 1124; *Comm. v. Dowdican*, 115 Mass. 136; *State v. Addy*, 14 Vr. 114; *Weaver v. People*, 33 Mich. 297; *Comm. v. Chase*, Thatcher's Crim. Cas. 269; *Fultz v. State*, 2 Sneed, 232; *Allen v. State*, Mart. & Yerg. 294; *People v. Reilly*, 53 Mich. 260; *Comm. v. Maloney*, 145 Mass. 205; *People v. Blackburn*, 6 Utah, 347; *Gibson v. State*, 68 Miss. 241; *State v. Hadley*, 110 N. C. 522; *Sylvester v. State*, 65 N. H. 193; *Rex v. Ryan*, Cox's Crim. Cas. 109; *Hinman v. People*, 1 Blackf. 66; *Fuller v. State*, 41 N. Y. 606; *Blend v. People*, 13 Hun, 266.). The common-law right vested in the courts to suspend sentence in criminal cases has not been taken away by any statute in this state (except only in murder cases, Code Crim. Pro. § 495); nor is the exercise of such right unconstitutional. (Penal Code,

§ 12; Code Crim. Pro. § 495; 1 Archibald on Crim. Prac. [8th ed.] 577, § 180; 1 Colby on Crim. Law, 390; 1 Chitty on Crim. Law, 699; 3 Whart. on Crim. Law [7th ed.], § 3395; Barbour on Crim. Law [3d ed.], 806, 807; *Fitzgerald v. Quann*, 109 N. Y. 445; *Manning v. Beck*, 129 id. 16; Laws of 1893, chap. 279; Penal Code, § 12.) The Court of Sessions having the power to exercise its discretion to impose sentence, or to suspend it during good behavior, this court cannot interfere with that discretion, even though it may think the discretion was improperly exercised. (High on Ex. Legal Rem. § 156.)

Fred C. Hanford for respondent. The Special Term is the proper tribunal in which to make this application. (Code Civ. Pro. §§ 2068, 2069.) There is practically no dispute as to the facts of this case; therefore, if the motion be granted, a peremptory writ of mandamus should issue in the first instance. (Code Civ. Pro. § 2070.) The Court of Sessions has ample power to bring the accused before it for sentence at any time. (Code Crim. Pro. § 299.) The Court of Sessions has no power to suspend sentence, and any attempt to exercise that power is a nullity. (*People v. Brown*, 54 Mich. 15; *People v. Reilly*, 53 id. 262; *People v. Morissette*, 20 How. Pr. 118; *United States v. Wilson*, 46 Fed. Rep. 748; *People v. Blackburn*, 23 Pac. Rep. 759; Penal Code, §§ 12, 13; Code Crim. Pro. §§ 482, 483.) Suspension of sentence during good behavior is, in fact, a conditional pardon, the defendant being granted exemption from the punishment imposed for his crime, on condition that he thereafter obey the laws and lead an exemplary life. The pardoning power is vested solely in the governor. (*People v. Brown*, 54 Mich. 15; *People v. Reilly*, 53 id. 262; *People v. Morissette*, 20 How. Pr. 118; *U. S. v. Wilson*, 46 Fed. Rep. 748; *People v. Blackburn*, 23 Pac. Rep. 759.) Article 4, section 5 of the State Constitution provides that the governor "shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such

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conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." Therefore, a suspended sentence in any case by a court, being a conditional pardon, is in conflict, and chapter 279, Laws of 1893, is unconstitutional. (Cooley on Const. Lim. 115; 26 Ala. 439; *State v. Sloss*, 25 Mo. 292; *State v. Todd*, 26 id. 175; 26 Ark. 74, 600.) The legislature, in passing chapter 279, Laws of 1893, have disregarded the express language of the Constitution. (*People v. Albertson*, 55 N. Y. 50; *Settle v. Van Evree*, 49 id. 280; *Sweet v. Hulbert*, 51 Barb. 312; *In re Woolsey*, 95 N. Y. 135.) A mandamus issues to compel discharge of official duty by a public officer. (127 N. Y. 391; *People ex rel. v. Rice*, 129 id. 449; *U. S. v. Peters*, 5 Cranch, 115.) A suspension of sentence being unauthorized and a nullity, and chapter 279, Laws of 1893, being unconstitutional, a mandamus from this court is the proper remedy to compel the Court of Sessions to do the duty imposed upon it by the statutes of this state governing the case at bar, which duty said court refuses to perform. (*People ex rel. v. Court of Sessions*, 1 Park. Crim. Rep. 369.)

O'BRIEN, J. The question presented by this appeal is novel and important. The Supreme Court has by mandamus commanded the Court of Sessions to proceed to judgment in a criminal case and to pass sentence upon the defendant after conviction. The power of the court to grant the writ under the circumstances disclosed by the record is denied.

On the 4th of March, 1892, John Attridge was convicted in the Court of Sessions of Monroe county, composed of the county judge and two justices of sessions, upon his own plea of guilty, of the crime of grand larceny in the second degree. The defendant was a clerk in a mercantile firm and the offense consisted in the appropriation to his own use of a sum of money which belonged to his employers and which came to his possession or under his charge by virtue of his employment. There were supposed to be certain mitigating circum-

stances connected with the transaction growing out of his youth, previous good character and otherwise that were presented to the court through a petition signed by numerous respectable citizens who prayed that his sentence be suspended. Three days after the conviction he was brought before the court and, the county judge presiding, sentenced him to imprisonment. The two justices of sessions dissented and announced as the judgment of the court that sentence be suspended. The defendant was remanded to the custody of the sheriff but discharged soon after from the commitment upon habeas corpus, granted by a justice of the Supreme Court holding a Court of Oyer and Terminer, on the ground that the sentence pronounced by the county judge, not having been concurred in by a majority of the court, was illegal. He was, however, remanded to the custody of the sheriff, to the end that the Court of Sessions might pronounce a legal sentence in the case. He was again brought before that court on the 14th of March and the judgment thereupon given that sentence be suspended during good behavior. The county judge dissented, and the defendant was thereupon discharged from custody. On the 27th of June following, the Supreme Court at Special Term, upon the application of the district attorney, granted a peremptory writ of mandamus commanding the Court of Sessions to proceed to judgment and to sentence the defendant to the punishment prescribed by law. The order granting the writ has been affirmed at the General Term.

✕ The precise question involved, therefore, is the power of a court of record, possessing jurisdiction in criminal cases, to suspend judgment after conviction. The Court of Sessions is a court possessing superior criminal jurisdiction and common-law powers. (*People v. Bradner*, 107 N. Y. 1.) It possesses all the powers formerly exercised by superior courts of criminal jurisdiction in England, except so far as these powers have been changed or abrogated by statute. There can, I think, be no doubt that the power to suspend sentence after conviction was inherent in all such courts at common law. The practice

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had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power as thus exercised is described in this language by Lord HALE: "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage." (2 Hale P. C. ch. 58, p. 412.) This power belonged of common right to every tribunal invested with authority to award execution in a criminal case. (1 Chitty Cr. L. [1st ed.] 617, 758.)

Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases. (2 Hawk. P. C. ch. 51, § 8; 1 Bishop's Cr. Pro. § 1124; 4 Bl. Com. ch. 31; *People v. Graves*, 31 Hun, 382; *People v. Harrington*, 15 Abb. N. C. 161; *People v. Whipple*, 9 Cow. 715; *Carnal v. People*, 1 Park Crim. Repts. 262, 266; *Commonwealth v. Dowdican*, 115 Mass. 136; *State v. Addy*, 43 N. J. L. 114; *Weaver v. People*, 33 Mich. 297; *People v. Reiley*, 53 id. 260; *Commonwealth v. Maloney*, 145 Mass. 205; *Sylvester v. State*, 65 N. H. 193.) The courts below were of the opinion that section twelve of the Penal Code deprives the court in all cases of any discretion with respect to the imposition of the punishment prescribed by law. The language of that section is as follows: "The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to impose the punishment prescribed." This provision was not intended to, and

did not, abrogate any power over the judgment which the courts possessed before. The provision is declaratory of the law as it always existed, for it was always the duty of the court to impose the punishment upon conviction, but this duty was never supposed to be inconsistent with the power to suspend the judgment till the next term of the court or indefinitely. Since the granting of the writ in this case the above section of the Penal Code has been amended by chap. 279 of the Laws of 1893, by adding to it these words: "But such court may, in its discretion, suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years, and such person has never before been convicted of a felony." It is admitted by the learned district attorney that this amendment, though passed since the writ in this case was directed by the order, is applicable to this case, as the defendant in the indictment has not yet been sentenced, and, if brought before the court for that purpose, pursuant to the command of the writ, sentence may be suspended if the enactment is valid. He meets this difficulty, however, by strenuously insisting that the amendment encroaches upon the power of the governor to grant reprieves and pardons, which is exclusively vested in him under the State Constitution. (Con. art. 4, § 5.) There can be no doubt that if the amendment distributes any part of the pardoning power conferred upon the executive to some other department of the government, the legislation is in conflict with the Constitution and invalid. The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power. The latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and

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the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. (*Ex parte Garland*, 4 Wall. 333; *U. S. v. Klein*, 13 id. 128; *Knote v. U. S.*, 95 U. S. 149.)

The framers of the Federal and State Constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments upon the executive with full knowledge of the law upon the subject, and the words of the Constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. (*Ex parte Wells*, 18 How. 307.) As this power was understood it did not comprehend any part of the judicial function to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate or in any degree restrict the exercise of the power in regard to its own judgments that criminal courts had so long maintained. The two powers, so distinct and different in their nature and character, were still left as they were before, separate and distinct, the one to be exercised by the executive and the other by the judicial department.

We, therefore, conclude that a statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, after conviction, a power inherent in such courts at common law, which was understood when the Constitution was adopted to be an ordinary judicial function, and which ever since its adoption has been exercised by the courts, is a valid exercise of legislative power under the Constitution. It does not encroach in any just sense upon the powers of the executive as they have been understood and practiced from the earliest times. The power to suspend the judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment and freed from the power of

the court to pass sentence, is open to more doubt. The legislature cannot authorize the courts to abdicate their own powers and duties or to tie their own hands in such a way that after sentence has been suspended they cannot, when deemed proper, and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammelled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper. This, we think, is all that the statute intends, and that was the only effect of the judgment. It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed no complaint has been heard of its abuse. The order of the General and Special Terms should be reversed and the mandamus denied.

All concur.

Orders reversed.

In the Matter of the Application of JOHN P. ADAMS, as Commissioner of City Works of the City of Brooklyn, to Acquire Land for Street Purposes.

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In 1835 the commissioners appointed under the act of that year to lay out streets, etc., in the city of Brooklyn (Chap. 132, Laws of 1835) made and filed a map showing a street passing over lands owned by H. The street was never actually opened or regulated. In 1851 H. conveyed the adjoining lands by deed which contained a reservation of his title and interest in the land forming the street. In 1864 the department of assessment of the city made and filed a map including said lands in which the street appeared substantially as in the map of 1835, and since then no assessment has been made or tax levied upon the land of H. included in said street. In 1879 the executors of H. filed a map of his lands, laid out in streets, blocks and lots, corresponding with the commissioners' map, with a notice, however, indorsed thereon to the effect that it was not intended to dedicate any of the lands lying within the lines of the streets to public use: afterwards said executors conveyed lots, bounding them upon said streets, and including the land within the street lines in front of the lots conveyed. In proceedings instituted by the municipal authorities to acquire title for street purposes to the lands within the lines of said street as so laid out, *held*, that H. and his executors, as between themselves and their grantees, devoted the lands to use as a street, and the latter acquired an easement therein for that purpose; that the executors were only entitled to an award for the value of the public easement, deducting therefrom the value of the private easement, and as the added burden was merely technical and nominal, they were only entitled to nominal damages.

(Argued January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which reversed an order of Special Term denying a motion to confirm the report of commissioners of estimate, granted said motion and confirmed said report.

The facts, so far as material, are stated in the opinion.

James C. Bergen for appellant. *Onus* of establishing dedication of lands by owner to public use is upon party setting up same and claiming to dispose of, use or otherwise interfere with such lands on the basis of such dedication. (*Holdane v.*

Trustees Cold Spring, 21 N. Y. 477.) Respondent failed to show acceptance by the public. Intention of owners to dedicate is not sufficient. It must be followed by acceptance by the public or a private person. (*Strong v. City of Brooklyn*, 68 N. Y. 1; *De Witt v. Village of Ithaca*, 15 Hun, 568; *Holdane v. Trustees Cold Spring*, 21 N. Y. 478.) Respondents failed to show acceptance on the part of private persons interested. (*In re Ingraham*, 4 Hun, 498; *City of Buffalo v. Pratt*, 131 N. Y. 293.)

Almet F. Jenks for respondent. There was a dedication of the land lying within the lines of Fifty-first street. (2 Dillon on Mun. Corp. [4th ed.] § 640; Gerard on Tit. to Real Estate [3d ed.], 738, 739; *Wiggins v. McCleary*, 49 N. Y. 346; *Wyman v. New York*, 11 Wend. 487; *Livingston v. New York*, 8 id. 85; *In re Lewis St.*, 2 id. 472; *In re Furman St.*, Id. 649; *In re 39th St.*, 1 Hill, 191; *In re Brooklyn*, 73 N. Y. 179-185; *In re 32d St.*, 19 Wend. 127; *De Peyster v. Mali*, 27 Hun, 439-442; *Village of Olean v. Stayher*, 135 N. Y. 341; *Lord v. Atkins*, 138 id. 184-191; *Speir v. Town of New Utrecht*, 121 id. 420-429.) The burden is upon the appellants to show "no dedication." (*In re City of Brooklyn*, 73 N. Y. 179-185.) It is unjust to burden the grantees of Thomas Hunt and his executors with the assessment which represents a substantial award. They purchased lands presumably at an enhanced value because located upon a proposed street. (Elliott on Roads & Streets, 119; *In re 67th St.*, 60 How. Pr. 275.)

O'BRIEN, J. The municipal authorities of Brooklyn instituted proceedings under chapter 365 of the Laws of 1889, as amended by chapter 452 of the Laws of 1890, to acquire title to lands for street purposes within the lines of Fifty-first street between Third and Fourth avenues as laid out upon the commissioners' map. This land formerly belonged to Thomas Hunt, who died in the year 1878, leaving a will, and his executor claimed substantial damages for the taking of the

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land, but the commissioners of appraisal awarded only nominal damages. The court at Special Term refused to confirm the report of the commissioners and it was set aside, but the General Term reversed the order and confirmed the report, and the executor of Hunt has appealed from the order of reversal to this court. Hunt purchased the lands in question for farming purposes as early as 1834. In 1835 or 1836 commissioners, appointed pursuant to the provisions of chapter 132 of the Laws of 1835, made and filed a map showing the location of the city streets, and the lines of Fifty-first street, as shown upon this map, include the lands now sought to be acquired. The street, however, was never actually opened or regulated. In 1851 Hunt conveyed the adjoining lands by deed under the following description and reservation:

"Beginning at the northeast corner of Third avenue and Fifty-first street; running thence northerly along the line of said avenue to lands of Calvin T. Spear; thence east along the lands last mentioned 740 feet to the centre of Fourth avenue; thence south along the centre of Fourth avenue 100 feet to the northerly line of Fifty-first street 740 feet to the place of beginning," and contained the following clause: "Not intending hereby to convey to the party of the second part any right, title or interest of, in or to the land adjoining the said premises, and forming a part of Fifty-first street."

In 1864 the department of assessment of the city made and filed a map of the 8th ward, in which the lands in question are located, for the purpose of assessment, and the lands are there laid out, and 51st street appears substantially as in the map of 1835. Since this map was filed no assessment was made or tax levied upon that part of the lands of Hunt embraced within the lines of Fifty-first street by the city or county. After the death of Hunt his executor, in June, 1879, filed a map of the lands, laying them off in blocks, lots and streets corresponding to the commissioners' map. There was indorsed upon this map, however, a notice to the effect that the streets and avenues thereon designated were for the purposes of description and reference only, and it was not intended

to dedicate any of the lands lying within the lines of the streets and avenues to public use as such, or for any other purpose. Afterwards the executor conveyed lots, bounding them upon the street, to other parties, in which the lands in front of the lots so conveyed and within the street lines were in terms included. The question is whether the executor of Hunt was under these circumstances entitled, as matter of law, to more than nominal damages for the lands taken, the title to which still remained in him, and included within the lines of Fifty-first street on the maps mentioned. The application by the city, to appropriate the land to the purposes of a street, must be regarded as an admission that it had not been completely dedicated for that purpose before by the owner. There can be no doubt, however, that the owner intended to and did devote the land to use as a street, at least as between himself and his grantees who purchased lots bounded upon the street. They acquired an easement in the strip of land for use as a highway in order to have access to and from the lots purchased. They were entitled to have it kept open as a street for their benefit, and that thereafter the owner held the title incumbered by an easement for the benefit of the grantees of the lots which he had sold, and it was subject to that easement when this application was made. The rights which the several grantees of lots on both sides of this strip of land thus acquired impressed upon it all the characteristics of a public street, though it may not have been completely dedicated by the owner to that purpose, or accepted by the public authorities as a highway. This servitude thus impressed upon the land could not be extinguished except with the concurrence and by the united act of every person who owned a lot bounded by the street. The commissioners, therefore, could only award the owner the value of the public easement proposed to be taken, deducting therefrom the value of the private easement which already incumbered the property, and we have held that in such cases the owner's damages are nominal only as the added burden is itself but technical and nominal. (*In re Village of Olean v. Steyner*, 135 N. Y. 341.)

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The principle upon which the general public right to the use of the land as a highway is acquired in such cases, without the payment of substantial compensation to the owner, was stated by Judge FINCH in the case just cited in these words: "The real burden is in no manner increased by absorbing the private in the public right, or substituting the latter in the room and stead of the former, since as burdens on the land they are substantially identical." The nature of the private easement and the damage to the owner by converting it into a public one are illustrated and explained by other cases. (*In re City of Brooklyn*, 73 N. Y. 184; *Lord v. Atkins*, 138 id. 184; *Cunningham v. Fitzgerald*, Id. 165; *Bissell v. N. Y. C. R. R. Co.*, 23 id. 63; *In re Eleventh Avenue*, 81 id. 446; *White's Bank of Buffalo v. Nichols*, 64 id. 73; *Wiggins v. McCleary*, 49 id. 346.) It follows, I think, from principles thus established that the executor of Hunt held the title to the land sought to be acquired by the city subject to an easement in favor of a part of the inhabitants on the line of the street, and its appropriation as a highway for the whole public, with the attendant duty and obligation to keep it in repair, safe and suitable for public use, entitled him to nothing more than nominal damages.

The order appealed from should, therefore, be affirmed, with costs.

All concur.

Order affirmed.

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MARIA A. LEWIS, Appellant, v. JULIA R. DUANE, as Administratrix, etc., Respondent.

A mortgage given to secure the payment of commercial paper or judgments up to a certain fixed amount is not given to secure unliquidated damages, and it may be foreclosed by advertisement.

Where such a mortgage is so foreclosed, and proper notices of sale are served, which disclose the amount claimed to be due thereon, and the mortgagor stands by silently and with approval, making no complaint as to the amount asserted to be due until long after the sale, in the absence of any claim of fraud this court will be slow to criticise or dispute that amount.

An attorney employed to foreclose a mortgage has no implied authority to compromise the rights of his client and make nugatory the duty he was employed to perform.

In June, 1873, L. executed to D. a mortgage as security for the payment of the sum of \$60,000, which sum by the terms of the mortgage was to be paid one year from date. An agreement was executed by D. at the same time stating the intent of the mortgage to be to secure him against liability as indorser for L., the amount of which was stated to be unknown but supposed to be about \$32,000; also to secure advances to satisfy judgments which were a lien upon the lands mortgaged, D. agreeing to take care of and protect L. and his property from the enforcement of any of said judgments. During the year D. paid out large sums of money under the agreement; a year thereafter he foreclosed the mortgage by advertisement. The foreclosure was conducted in accordance with the statute. The notice, which stated the amount claimed to be due on the mortgage, was duly served on L. In an action brought in September, 1883, against the executrix of D. for an accounting and to redeem the lands sold under the mortgage, it appeared that at the time of the foreclosure D. had paid out under the agreement over \$42,000, and that there remained outstanding, judgments which were liens on the premises to the amount of \$20,000; also that there was indorsed paper outstanding, the whole amounting to much more than the sum secured. It was claimed by plaintiff that the foreclosure was premature because D. had not paid off all of the judgments. *Held*, untenable; that the agreement did not alter or change the maturity of the mortgage, and while D. became bound for the eventual payment of the judgments, he had the right, after the expiration of the year, to resort to the property itself for the means of carrying out the contract, he being bound in the meantime only to pay judgments when necessary to prevent a sacrifice of the property or an enforcement against L. personally.

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Also, *held*, that the mortgage was properly foreclosed by advertisement; that it was not given to secure unliquidated damages, as the indorsed paper and judgments were for settled and fixed amounts, and all that was necessary to ascertain the sum for which the mortgage stood as security was to add them together.

It was claimed that the papers executed constituted a trust. *Held*, untenable; that the relations of the parties were simply those of mortgagor and mortgagee.

It appeared that D. in some cases when he paid judgments did not have them discharged of record, but caused them to be transferred to his wife, who was a sister of L.; this was done with the assent of the latter. *Held*, that as none of the property of L. was wasted or sacrificed on execution sales, the agreement of D. was fully performed; that the mode of protecting L. resorted to was within the scope of the agreement.

The attorney who foreclosed the mortgage for D. was dead at the time of the trial. Plaintiff offered to prove that said attorney told L. that the foreclosure would make no difference as to the agreement between him and D. This was objected to and excluded. *Held*, no error.

Reported below, 69 Hun, 28.

(Argued January 30, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 25, 1893, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This action was brought in September, 1883, against defendant individually and as administratrix of Patrick H. Drake, and as executrix of Jane E. and Virginia M. Drake, for an accounting and to redeem certain lands which Patrick H. Drake had claimed to own as purchaser under the foreclosure of a mortgage executed to him by Frederick Lewis and wife. The action was commenced by said Lewis and his wife and he having died has been continued by the latter as successor in interest.

The said mortgage was by its terms executed to secure the payment of \$60,000 one year from date, with interest. An agreement was executed by said Drake at the same time of which the following is a copy:

"Frederick Lewis and Maria A. Lewis, his wife, both of the city of Binghamton, Broome county, N. Y., have this 4th

day of June, 1873, executed and delivered to Patrick H. Drake, of the city and county of New York, a mortgage upon all their real estate situate in the said county of Broome, for sixty thousand (60,000) dollars. The value of the property covered by the said mortgage is about one hundred thousand (100,000) dollars.

"The intention of the undersigned by this said mortgage is to secure the said Drake against all liability he has or may have incurred as indorser for the said Lewis. The precise amount of such liability as such indorser is unknown, but supposed to be about thirty-two thousand (32,000) dollars.

"And also to secure the said Drake for advances which he is to make to liquidate and satisfy the large amount of judgments against the said Lewis which are a lien upon the property covered by the said mortgage.

"The said Drake in the taking of the said mortgage only desires to secure himself for the amount of his liability as such indorser, and for the advances which he is to make in taking up and satisfying the judgments against the said Lewis. Anything more than this is not contemplated by the said Drake.

"When the amount of such liabilities and advances is ascertained or liquidated then the said Drake to indorse same, or reduce said mortgage to the true amount so advanced by him. In case he shall assign or part with the control of the said mortgage, he is to account to the said Lewis for the full amount that said Lewis may have to pay upon the same, or which he will be liable to pay to the holder thereof. In the meantime the said Drake will take care of and protect the said Lewis and his property from the enforcement of any of the judgments against the said Lewis or his property and save the property of the said Lewis from sacrifice, and the said Lewis from damages and costs.

"And that he will at any time assign said mortgage to said Lewis' order upon being reimbursed on his advances, in case he shall not have previously assigned the same."

The material facts are stated in the opinion.

Edward K. Clark and *Roger P. Clark* for appellant. The statutory foreclosure was premature, void, voidable or inoperative. (*Warner v. Blakeman*, 36 Barb. 501; *Casserty v. Witherbee*, 119 N. Y. 522; *Hamilton v. Taylor*, 18 id. 361; *Church v. Brown*, 21 id. 319; *Parks v. Comstock*, 59 Barb. 33; *Horn v. Keteltas*, 46 N. Y. 605; *Macauley v. Smith*, 132 id. 530; *Hall v. Bartlett*, 9 Barb. 300; *Crary's Special Proceedings* [1st ed.], 59; *Mowry v. Sanborn*, 68 N. Y. 161; *Low v. Purdy*, 2 Lans. 424; *Mackenzie v. Alster*, 64 How. Pr. 389; *Van Schaack v. Saunders*, 32 Hun, 518; *Spencer v. Annon*, 4 Minn. 542; *Ferguson v. Kimball*, 3 Barb. Ch. 619; Willard's Real Estate, 143; *Campbell v. Swan*, 48 Barb. 112; *Stewart v. Hutchins*, 13 Wend. 485; *Wilkins v. Gordon*, 11 Leigh [Va.], 547; *Gibson v. Jones*, 5 Leigh, 370; *Riggs v. Armstrong*, 23 W. Va. 760; *Jones on Mort.* [4th ed.] § 1776; *Kornegay v. Spicer*, 76 N. C. 95; *Mosby v. Hodge*, Id. 387; *Pritchard v. Sanderson*, 84 id. 299; *Bridgers v. Morris*, 90 id. 32; *Gooch v. Vaughan*, 92 id. 610; *Baldwin v. Allison*, 4 Minn. 25, 30; 2 *Perry on Trusts*, § 602; *Soule v. Ludlow*, 3 Hun, 504, 505; *Jenks v. Alexander*, 11 Paige Ch. 624; *Howard v. Ames*, 3 Metc. 311.) The transaction created a trust. (*McArthur v. Gordon*, 51 Hun, 511; *Park v. Comstock*, 59 Barb. 33; *Horn v. Keteltas*, 46 N. Y. 608; *Macauley v. Smith*, 132 id. 524; *Clark v. Henry*, 2 Cow. 324; *Hoyt v. Martense*, 16 N. Y. 231; *Dalton v. Smith*, 86 id. 176; *Slee v. M. Co.*, 1 Paige, 48; *Brown v. Tyler*, 8 Gray, 135; *Stevens v. Dedham, etc.*, 126 Mass. 547; *Terrett v. Crombie*, 6 Lans. 58.) Mr. Drake and his successors in the benefits are liable under his express contract. (*Hall v. Bartlett*, 9 Barb. 300; *King v. Platt*, 37 N. Y. 155; 34 How. 26; *Howell v. Mills*, 53 N. Y. 333; *Burnet v. Denniston*, 5 Johns. Ch. 35; *McMurray v. McMurray*, 60 Barb. 127; 66 N. Y. 175, 180, 181; *Hubbell v. Sibley*, 50 id. 468; *Code Civ. Pro.* § 388; *Warner v. Blakeman*, 4 Keyes, 487.)

S. C. Millard for respondent. The claim that Drake, by virtue of the agreement of June 4, 1873, became trustee for Lewis of the property described in the mortgage, ought not, and cannot, be maintained. (*Herman on Mort.*, 204, 205, 206.) The acts and conduct of the parties immediately following the foreclosure sale do not favor plaintiff's claim that Drake, in purchasing the property at the sale, was to hold it as a security or as trustee for Lewis. (*Erwin v. Curtiss*, 43 Hun, 292; *Ensign v. Ensign*, 120 N. Y. 655.) The foreclosure of the mortgage was not premature. (*Jones on Mort.* [4th ed.] § 1776.) The statement of the amount due in the notice of sale was not an error which vitiated the foreclosure proceedings. (*Mowry v. Sanborn*, 68 N. Y. 168; *Jenks v. Alexander*, 11 Paige, 626.) It is also claimed that the mortgage could not be foreclosed by advertisement owing to the fact that it was given to secure an unliquidated amount. This is untenable. (*Bolts v. Collins*, 13 Wend. 156; *Mowry v. Sanborn*, 68 N. Y. 165; *Jones on Mort.* [4th ed.] § 1776.) The right of the mortgagor to redeem is terminated whenever there has been a sale of the mortgaged premises regularly made, pursuant to the power contained in the mortgage. (*Tuthill v. Tracy*, 31 N. Y. 157; *Jackson v. Slater*, 5 Wend. 296; *Ingraham v. Baldwin*, 12 Barb. 20; *Warner v. Blake-man*, 36 id. 518; *Elliott v. Wood*, 53 id. 305.) The question, "Did Mr. Hotchkiss tell you, or say to Mr. Lewis in your presence, that the foreclosure should make no difference as to the agreement between Mr. Drake and Mr. Lewis?" was improper. (*Anderson v. R., W. & O. R. R. Co.*, 54 N. Y. 341; 1 Greenl. on Ev. § 113; *Luby v. H. R. R. Co.*, 17 N. Y. 131; *Gutchess v. Gutchess*, 36 Barb. 483; *Marvin v. Wilbur*, 52 N. Y. 270; 1 Pars. on Cont. [5th ed.] 39, 40, 45; *Lansing v. Coleman*, 58 Barb. 611; 13 N. Y. 637; *Adee v. Howe*, 15 Hun, 21; *McKenzie v. Harrison*, 120 N. Y. 260; *Smith v. Kerr*, 108 id. 31.)

FINCH, J. The plaintiff's right to an accounting under the agreement which made the mortgage from Lewis to Drake

collateral to certain described liabilities and promised advances of the latter is apparently barred by the foreclosure of that mortgage which has vested the legal title in the purchasers at the sale and extinguished the mortgagor's right of redemption. It is, consequently, over the validity and operative force of that foreclosure and sale that the controversy has been carried on both in the proofs and the argument addressed to the trial court and the General Term, and it is substantially upon that point only that a final judgment is now sought.

The mortgage was given by Frederick Lewis and his wife in June of 1873, to Patrick H. Drake, as security for the sum of sixty thousand dollars to be paid in one year from that date. An agreement executed by the mortgagee at the same time indicates the purpose of the security, the consideration upon which it rested, and the extent to which it was intended to operate. That agreement shows that Lewis was in embarrassed circumstances, unable to pay his debts, and exposed to executions which threatened a sacrifice of his entire property; that he had come to Drake for help and protection, in the hope, by his intervention, of saving something from the wreck; and that the purpose was to put the debtor's property in the hands of Drake, both to secure the latter for his large liability as indorser, and obtain for the former an application of his property, without sacrifice, to the discharge of his debts. The agreement estimates the value of the land mortgaged at "about one hundred thousand dollars," a sum which it did not bring and which was largely in excess of the actual market value; a result not strange in view of the almost invariable tendency of a failing debtor to overestimate the actual value of his assets. The agreement put Drake's liability, as indorser for the mortgagor, at about thirty-two thousand dollars, but conceded that to be only a supposition, and that the true amount was at the moment unknown. Equally uncertain was the total of the judgments against Lewis which were already liens upon the lands mortgaged. Out of these uncertainties the sum of sixty thousand dollars was fixed upon for the purposes of the mortgage, as a sum likely to cover the

prior liens upon the land and Drake's liability as indorser. Such prior liens he was to assume and discharge, and pay off the notes which he had indorsed, and so far as he did so to do it out of his own means during the year of grace which the mortgage secured to the debtor, and that instrument was to stand as security for the advances made and to be made and the indorsed notes paid and discharged.

At the end of the year, and the consequent maturity of the mortgage debt, Drake had paid out large sums of money under the agreement which Lewis was unable to reimburse; and it became obvious that Drake would be compelled to resort to his security. The drain upon his own resources had become heavy and was daily increasing; he had borne the burden for the stipulated time, and since the debtor could not pay, it was just and proper to resort to his property pledged for that purpose. But Drake was not hasty or impatient. He bore the burden for still another year, and doubled the time for which Lewis had stipulated, but no relief came from the debtor and the hope of any had practically disappeared; and Drake then foreclosed the mortgage by advertisement and cut off the mortgagor's equity. That foreclosure was conducted in conformity with the statutory provisions, and is not criticized so far as a due observance of those provisions is concerned, but is assailed upon grounds which go to the mortgagee's right to foreclose, to the amount which was asserted to have become due, and to the consequence claimed to have resulted.

The first proposition of the appellant is that the foreclosure was premature, because Drake agreed to advance the money necessary to pay off the incumbering judgments and had done so only in part. The referee finds as a fact that at the date of the foreclosure Drake had paid out under the agreement a little over forty-two thousand dollars, and that there remained outstanding judgments which were a lien to the amount of twenty thousand dollars more. Now, the agreement did not purport to alter or change the maturity of the mortgage. There is no word in it to that effect. On the contrary, all its provisions are consistent with the explicit terms of that instrument which

allowed Drake at the end of one year, in case of Lewis' default, to resort to the mortgaged property itself for the means of carrying out and fully accomplishing the purposes of the agreement. Its stipulations contemplated an assumption by Drake of the judgments which were liens on the property, and because it was only after their payment that any surplus could be reached applicable to his liability as indorser; but while he became bound for their eventual payment, he had a right, after one year, to resort to the property itself for the means of carrying out the contract, and in the meantime was bound to pay judgments only when necessary to prevent a sacrifice of the property or an enforcement against Lewis personally. The mortgage debt, therefore, was due and payable when the foreclosure proceedings were commenced, and they were not prematurely instituted; unless there is force in the further contention that the amount secured was unliquidated, and was to be ascertained as a condition precedent to the foreclosure.

It may be that where a mortgage is given to secure unliquidated damages they must be fixed and ascertained before the mortgage can be foreclosed. Until then it is impossible to know what sum will redeem the security on the one hand or satisfy it on the other; but if in such case no foreclosure by advertisement can be had the rule applies only where the damages are strictly of that character. What such damages are is shown in *Butts v. Collins* (13 Wend. 156), and what they are not is settled in *Mowry v. Sanborn* (68 N. Y. 153). The former case describes them as resting in opinion merely, to be ascertained by the verdict of a jury, and not susceptible of computation or calculation. The latter case sustained a foreclosure by advertisement where the mortgage was given to secure outstanding commercial paper up to a certain fixed amount. That is the situation here. The indorsed paper and the judgments were for settled and ascertained amounts. To schedule them correctly and add them together was all that was necessary to show for what sum the mortgage stood as security. Allusion is made to the provision in the agreement

that the mortgage should be indorsed down to the actual amount due on it. That clause operates only when less than the principal is the amount of the debt, and has no application where the latter is in excess and no indorsement at all is requisite or permissible.

And that brings us to the appellant's principal contention; which is that the mortgage was foreclosed for a much larger amount than was due on it. There is no allegation of any fraud upon the mortgagor. Proper notices of sale were served upon him, and they disclosed the claim of Drake that there was due on the mortgage the full amount of principal and interest. Lewis was either present or might have been present at the sale and made neither objection nor protest, and none is heard from him for years thereafter, not even when he is required to surrender possession, and not until Drake's death had lessened the means of explanation. Where no fraud is charged, and the mortgagor stands by silently and with approval, and makes no complaint, we should be very slow to criticize or dispute, long after the sale, the amount asserted to be due.

But in spite of all difficulties flowing from the death of Drake, I think it is made quite apparent that when the mortgage was foreclosed very much more was due than the amount of its principal and interest. The referee finds that at such date Drake had actually paid out upon notes and judgments a little more than forty-two thousand dollars, and that there remained unpaid liens on the property to the amount of at least twenty thousand dollars more, exclusive of the accrued interest thereon. The evidence indicates, according to the computation of the respondent, the details of which are furnished for our inspection, and which appear to be correct, that at the date of the mortgage there were outstanding judgments which were liens on the property and which Drake assumed and agreed to pay and discharge, and which he was obliged to assume before reaching protection for his own liability, to the amount of almost thirty-six thousand dollars, and notes on which he was charged as indorser to the amount of forty thousand dollars more, making a total exceed-

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Opinion of the Court, per FINCH, J.

ing the principal of the mortgage by more than fifteen thousand dollars.

Some of the items which enter into the computation are criticized by the plaintiff, and the computation itself assailed for alleged inaccuracies.

It is said that Drake did not in all cases discharge the judgments of record, and assigned or caused some of them to be assigned to his wife. She was Lewis' sister, and the transfers were with his assent. The language of the agreement shows that such a mode of protecting Lewis from damages and costs and his property from sacrifice was within the scope of the arrangement. The words are: "In the meantime the said Drake will take care of and protect the said Lewis and his property from the enforcement of any of the judgments against the said Lewis or his property, and save the property of said Lewis from sacrifice and the said Lewis from damages and costs." That covenant was fully performed. None of the property was wasted or sacrificed on execution sales; it was all applied to the payment of Lewis' debts; no judgment in any manner charges or menaces his estate; each and all of them are paid; and Drake only is a loser by the transaction.

It is said that until actual advances in payment of judgments were made the latter formed no part of the debt protected by the mortgage. But that was intended as an indemnity to Drake. He did not covenant to pay the outstanding judgments in express terms, but did agree to save Lewis harmless therefrom, and protect him against the sacrifice which would result from their enforcement by execution sales. Drake's liability attached at once, and on appellant's own theory the mortgagee became responsible to the judgment creditors. Whether that be quite true or not, Drake, at least, by the terms of his agreement became liable to Lewis to pay all these judgments so far as necessary to protect him from loss, and took his own security subject to such payments, every one of which was eventually to be discharged. Drake's right to resort to his security sprang up at its maturity and was not postponed until his actual payments (*Kohler v. Mailage*, 72 N. Y. 259.)

It is further insisted that the referee erred in not crediting upon the mortgage a sum of five thousand dollars paid to Drake by Lewis. The proof tends to show that the amount was applied by Drake upon a note of Lewis, outside of and in addition to those embraced in the mortgage consideration.

There are many other criticisms upon the accounts as it respects their details, but these were all submitted to the consideration of the referee and constituted elements of the question of fact upon which his finding ought to be and is conclusive upon us. We are unable to find any just reason for reversing his determination that at the date of the foreclosure at least the full sum of principal and interest was due on the mortgage.

But, assuming that to be true, the plaintiff urges that, by not discharging the judgments on the record, the mortgagee was enabled to make the sale and become the purchaser under the cloud of a seemingly double incumbrance, and so purchasers were prevented from bidding. But the result came from Lewis' assent. Paid judgments were assigned to Mrs. Drake, instead of satisfied of record, with his knowledge and approval. He, at least, knew the truth and did not object. He might have explained, but did not. He might have required Drake to make the record correspond with the fact, but chose not to do so, and evidently preferred in his own interest that Drake should be the successful bidder. It is impossible not to see that such was his attitude. He knew very well that nobody could afford to take the property, burdened with its actual liability, except Drake, to whom it was a necessity if he hoped to obtain any protection; and Lewis occupied the homestead, long after the sale, by Drake's sufferance, while waiting for a purchaser. There is not only no claim of fraud made in the complaint, but not a single allegation of fact pertinent to a setting aside of the sale, and no such relief asked. Whatever of force there might have been under some circumstances in the objection made, it has no just application as a ground of this appeal.

Nor can the effect of the foreclosure be avoided by the con-

attention that the papers executed between the parties constituted a trust. They plainly established the relation of mortgagor and mortgagee, and not that of trustee and beneficiary. The mortgage was, as a mortgage always is, collateral to a debt due or to become due to the mortgagee, which in this case was the liability of Drake as indorser, necessarily increased in the result by the incumbering judgments first to be paid before protection of any kind could be reached. There were about the transaction no elements of trust beyond those which commonly attend a mortgage given as collateral. (*Williams v. Townsend*, 31 N. Y. 415.) The result might have been different if Lewis had not been made a party to the foreclosure so that his equity survived.

An effort was made in that direction through the agency of some parol evidence which was excluded at the trial but is now claimed to have been admissible. The attorney foreclosing the mortgage for Drake was Mr. Hotchkiss, who was dead at the time of the trial. Mrs. Lewis was asked this question: "Did Mr. Hotchkiss tell you, or say to Mr. Lewis in your presence, that the foreclosure should make no difference as to the agreement between Mr. Drake and Mr. Frederick Lewis?" The question was objected to and excluded and the plaintiff took an exception. The only authority of Mr. Hotchkiss was derived from his position as the attorney of Drake in the proceedings for foreclosure. No other agency is shown, and the question presented is whether an attorney employed to foreclose a mortgage has, by virtue of his office, an implied authority to give away the entire right of his client and make nugatory the very duty which he was employed to perform. There ought to be and there can be but one answer to that question. The primary and principal purpose of the foreclosure was to extinguish the equity of redemption. For that purpose the notices were served upon Lewis and his wife, and the whole proceeding was a waste and a nullity without it. To assure the mortgagor that the legal effect of the pending foreclosure should be annulled and the rights of the parties nevertheless remain unchanged was

to give away and destroy the entire right of the client and invalidate the proceeding itself: An attorney, as such, may not compromise the rights of his client outside of his conduct of the action, or accept less than the full satisfaction sought, or release his client's right, or subject him to a new cause of action. (*Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 469; *Barrett v. Third Ave. R. R. Co.*, 45 id. 635; *Beers v. Hendrickson*, Id. 665.) The evidence offered could only be material by completely annulling the legal effect of the proceedings as against the mortgagor. The attorney had no such authority and the evidence was properly excluded.

Beyond the legal questions involved I have quite carefully gone through the evidence to see if Lewis has been in any manner wronged. There is no possible basis for any such theory unless upon the ground that there was a real surplus of value in the property mortgaged beyond the incumbrances and the conceded debt of Drake. There are some opinions in that direction but the weight of evidence, and especially the plain and decisive facts are the other way. No process can create the desired surplus except one which stands on opinions of cost or intrinsic worth instead of market value for purposes of sale, and which compels Drake to account for the property at double the amount which he was able to get on a sale.

I think the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

FREDERICK H. SMITH, Jr., Appellant and Respondent, v.
FRANCIS W. SAVIN et al., Impleaded, etc., Appellants and
Respondents.

Prior to May 8, 1884, plaintiff had deposited with B. & Co., who were bankers and brokers in New York city, 100 shares of corporate stock as security for any indebtedness to that firm. On that date B. & Co., without the knowledge or consent of plaintiff, pledged said stock, with other shares of stock belonging to said firm, with S. & Co. as security for a loan. The loan was made subject to the rules of the New York Stock Exchange, of which the member of each firm who negotiated it was a member. The latter firm were *bona fide* pledgees, having no knowledge that B. & Co. were not the owners of all the stock pledged. Plaintiff was not in fact at the time of the pledge equitably indebted to B. & Co. in any sum whatever, and did not thereafter become so indebted. On May 14, 1884, B. & Co. failed, and made an assignment. Plaintiff on that day learning of that fact, and also then learning for the first time that his stock had been so pledged, notified S. & Co. of his interest, and requested a statement of the amount for which his stock was held. S. & Co. refused to give any information, or to recognize plaintiff's rights. S. & Co. on the same day, without notice to plaintiff or B. & Co., and in violation of the rules of the said Exchange, sold all the stock so pledged. Plaintiff's stock sold for about \$8,000, and after applying the proceeds of all the stock pledged in payment of the loan, there remained about \$3,000 in the hands of S. & Co. Plaintiff did not learn of the sale of his stock until June 21, 1884, at which time the price of said stock had reached par, and the prices of the other stock sold had so advanced that if they had been held and then sold the proceeds would have paid the loan, leaving plaintiff's stock free from any claim. In an action for conversion S. & Co. claimed the right to apply the balance in their hands upon another debt due them from B. & Co. *Held*, untenable; also, that while S. & Co., as *bona fide* pledgees, were entitled to regard B. & Co. as owners of all the stock pledged until notified of plaintiff's rights, having been so notified prior to the sale, he then stood, with reference to his stock, as surety, with the right to compel them to apply the proceeds of the other stocks before resorting to his stock; that as to his stock, he had the right to require a sale in accordance with the rules of the Stock Exchange, and could treat the unlawful sale as a conversion, and after the proceeds of the sale of the other stocks had been applied to the payment of the loan, he was entitled to the highest price which his stock reached within a reasonable time after its illegal sale, and to judgment for that sum, deducting therefrom the balance due S. & Co. after such application;

and that as plaintiff did not learn of the sale until after June twenty-first, that was a reasonable time; but *held*, in regard to the other stock sold, plaintiff was not entitled to charge S. & Co. with the highest price because of the unlawful sale, and so long as it sold at its full market value at the time of sale, he could not complain.

Thompson v. St. N. Nat. Bank (113 N. Y. 327), distinguished.

Plaintiff's original complaint alleged that the other stocks pledged by B. & Co. sold for enough to pay their debt; that his stock was sold for \$9,000, for which sum he asked judgment. Plaintiff did not know, until after the cause was at issue and referred, of the time, place or manner of sale of his stock, or that it had been sold without demand of payment or notice; he thereafter went to trial; judgment was rendered against him, which was reversed on appeal. Plaintiff thereupon moved to be allowed to amend his complaint by setting up the illegal sale and asking damages; this was granted upon condition of payment of all of defendants' costs, which condition was accepted and the complaint amended. Defendants claimed that plaintiff had elected, by the form of his original complaint, to affirm the sale. *Held*, untenable; that plaintiff, having proceeded originally in ignorance of the facts, could not be held as having conclusively ratified the illegal sale; and that, under the circumstances, he did not lose the right to repudiate the sale by proceeding to trial under the original complaint.

The certificate of plaintiff's stock was issued in his name; the power of attorney to transfer was a detached paper, and plaintiff's signature thereto was not acknowledged as required by the rules of the Stock Exchange. *Held*, that S. & Co. were not thereby charged with any notice of defect of title on the part of their pledgors.

Reported below, 69 Hun, 311.

(Argued January 24, 1894; decided February 27, 1894.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 31, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to restrain the defendants Francis W. Savin and Elisha W. Vanderhoof, composing the firm of Savin & Co., from paying over to the defendant John Wheeler, as assignee and receiver of O. M. Bogart & Co., the proceeds of sale of 100 shares of Missouri Pacific stock, and to have the same adjudged to be the property of plaintiff.

All parties to this action have appealed from the judgment

of the General Term of the Supreme Court, which affirmed a judgment for plaintiff, entered on the report of the referee.

The plaintiff has appealed because the judgment which he has obtained was not as large in amount as he thinks he is entitled to, while the defendants Savin & Co. have appealed because they think any judgment against them is erroneous. The defendant Wheeler, the assignee of Bogart & Co., has appealed because he claims that the judgment in favor of plaintiff should have been in his favor as against defendants Savin & Co., and that the plaintiff should only share *pro rata* with the other creditors of Bogart & Co. in the amount of the recovery against Savin & Co. The facts upon which the questions arise are as follows:

For a long time prior to May 14, 1884, the plaintiff had done a banking business with O. M. Bogart & Co., a firm of bankers and brokers in the city of New York, and among other stocks the plaintiff had on deposit with that firm on the 8th of May, 1884, one hundred shares of the capital stock of the Missouri Pacific Railroad Company, of the par value of \$10,000. This stock, together with stock in other corporations, had been deposited by the plaintiff with the firm as security for the payment of plaintiff's indebtedness to it, which, on the 13th of May, 1884, apparently amounted to the sum of over \$48,000, but in fact the plaintiff was at no time since the 8th of May, 1884, equitably indebted to the firm of Bogart & Co. in any sum whatever.

On the date last stated Bogart & Co., wrongfully, and without the knowledge or consent of the plaintiff, pledged with the defendants Savin & Co. this scrip, then owned by the plaintiff, together with 500 shares of stock of other corporations, belonging to Bogart & Co., the whole being pledged as security for a call loan of \$50,000 then obtained by Bogart & Co. from Savin & Co. The transaction was concluded between one of the members of each firm, who were also members of the New York Stock Exchange, and the loan was made subject to the rules of the Exchange.

The defendants Savin & Co. were ignorant of the fact that

Bogart & Co. were not the owners of the 100 shares of Missouri Pacific stock and the defendants were *bona fide* pledgees of all the stock as security for the amount of their loan of \$50,000. On the morning of May 14th, 1884, Bogart & Co. failed and made an assignment to defendant Wheeler for the benefit of their creditors. Plaintiff learned of the fact of the assignment on the same day and soon after it was made, and he then for the first time learned that his Missouri Pacific stock had been pledged to and was in the hands of Savin & Co., to whom he immediately went and notified them of his interest in that stock, and requested from them a statement as to the amount for which they held the same. The defendants refused to recognize plaintiff's rights in the stock, and refused to give him any information whatever concerning the transaction for which it was held. This was before the stock was sold by the defendants. When they heard of the assignment and sometime in the morning of the 14th, one of the defendants made a demand at the place of business of Bogart & Co., of one who had been a clerk but who was not a member of that firm, for the re-payment of the loan, which was not complied with and thereupon the defendant Savin went to the stock exchange and within half an hour sold all the stocks which had been pledged as security for the loan. The sales were made on the floor of the exchange, partly through two private brokers and partly through Savin himself, and all the sales were without notice to Bogart & Co., or to their assignee, or to the plaintiff, and they were all made in violation of the rules of the stock exchange. The amount realized at the sales for all the stocks was about \$53,000, and for the stocks owned by Bogart & Co., deducting the stock owned by the plaintiff, the sum of a little over \$45,000, leaving between \$7,000 and \$8,000 as the proceeds of the sale of the plaintiff's stock, and after applying these proceeds to the balance of the debt due Savin & Co. from Bogart & Co. of \$50,000 there remained a little over \$3,000 in the hands of Savin & Co., which they claimed the right to apply on account towards the payment of another debt due them from Bogart & Co., but which was not

secured by the pledge of the stock in question. The plaintiff did not learn of the sale of his stock until about the 21st of June, 1884, at which time the price for such stock had reached par. The prices of the other stocks sold by the defendants, and which belonged to Bogart & Co., also rose soon after the stocks had been sold by Savin & Co., and to such an extent did the prices advance that if these stocks had been held by defendants up to June 4, 1884, and then sold at the market price, the amount realized at such sale would have been sufficient to pay the full amount of the call loan and interest, and would thus have left the stock of plaintiff free from any claim by reason of that loan. In May, 1885, the plaintiff commenced this action against the defendants Savin & Co., and also against the defendant Wheeler as assignee of Bogart & Co.

In the original complaint the plaintiff alleged that the other stocks pledged by Bogart & Co. sold for enough to pay their debt to the defendants Savin & Co., and that this stock of the plaintiff was sold for \$9,000, and that the defendants Savin & Co. claimed the right to apply that sum to the payment of the balance due them from Bogart & Co. on another loan. The plaintiff asked judgment that the \$9,000 might be adjudged to be his property and that Savin & Co. be directed to pay the same over to him and that the assignee be barred from all claim and interest therein. At the time he commenced this action the plaintiff did not know of the time, place or manner of sale of the stocks held by the defendants Savin & Co., nor did he know that they had been sold without any demand of payment on Bogart & Co. or their assignee, or that they had been sold without any notice of an intention to sell.

After this action was at issue and referred to a referee, the plaintiff learned for the first time and from the testimony of the defendant Savin in another action, the manner and time of sale of the stocks in question, and on the first trial of this action in May, 1889, if not before, he knew that such sale was not in strict accordance with the provisions of the by-laws of the New York Stock Exchange. The referee on the first

trial reported in favor of the defendants, and upon plaintiff's appeal the judgment was reversed by the General Term, from which the defendants appealed to the Court of Appeals, which court subsequently and upon their application allowed defendants to withdraw their appeal. Then the plaintiff upon motion papers asked the court for leave to amend his complaint by setting up the facts as to the illegal sale and by asking for damages for the sale of his stock by the defendants. This motion was granted upon condition of the payment of all the costs of all the defendants up to the making of the motion (amounting to over \$1,200), which the plaintiff paid and amended his complaint accordingly. The defendants answered and denied any and all liability, and among other things alleged that the plaintiff had elected to affirm the sale of the stock and to proceed against defendants for the amount realized on the sale. The second trial was also before a referee, who gave judgment for the plaintiff for the highest price his stock reached intermediate the day of sale by defendants at the stock exchange and the 21st of June, 1884, deducting therefrom the balance of the original debt due Savin & Co. from Bogart & Co., after applying thereon the proceeds of the sale of the other mentioned stocks.

The plaintiff claims that the defendants should have been charged with the highest prices the other stocks reached within a reasonable time after their improper sale by defendants, in which case those stocks would have paid the \$50,000 call loan debt in full and would have given plaintiff the highest price for his stock without any deductions whatever. The defendants Savin & Co. claim they were under no liability of any kind to the plaintiff, and that judgment ought to have been directed for them by the referee. The assignee, Wheeler, claimed that the moneys should have been directed to be paid to him as already stated.

Thaddeus D. Kenneson for defendants. When Savin & Vanderhoof made the call loan of \$50,000 to O. M. Bogart & Co. on May 13, 1884, and received from that firm as collateral

security therefor the certificates of stock, including certificate 9728 for 100 shares of Missouri Pacific stock, they became purchasers for value thereof without notice. (*Felt v. Heye*, 23 How. Pr. 359; *McNeil v. F. N. Bank*, 46 N. Y. 325; *Thompson v. Toland*, 48 Cal. 99.) If Savin & Vanderhoof were purchasers for value of such certificate of Missouri Pacific stock, then Smith cannot recover in this action. (*H. Ins. Co. v. Halsey*, 8 N. Y. 271; *Colgrove v. Tallman*, 67 id. 95; *Calvo v. Davies*, 73 id. 211; *Harding v. Tift*, 75 id. 461; *Palmer v. Purdy*, 83 id. 144; *King v. T. B. & Ins. Co.*, 58 Tex. 669; *Gillespie v. Torrance*, 25 N. Y. 306; *Clements v. Yturria*, 81 id. 285; *Duncan v. Brennan*, 83 id. 487; *Talty v. F. S. & T. Co.*, 93 U. S. 321; *Lewis v. Mott*, 36 N. Y. 395; *Donald v. Suckling*, L. R. [1 Q. B.] 585; *Halliday v. Holgate*, L. R. [3 Ex.] 299; Code Civ. Pro. §§ 1718, 1728; *Thompson v. Toland*, 48 Cal. 99; *Myers v. M. N. Bank*, 27 Abb. [N. C.] 266.) The defense of an election of remedies by the plaintiff is proved and should defeat this action. (*Conrow v. Little*, 115 N. Y. 387; *Terry v. Munger*, 121 id. 161; *Crossman v. U. R. Co.*, 127 id. 34, 37; *People v. Wood*, 121 id. 522; *Post v. Doremus*, 60 id. 375; *Todd v. Marsily*, 49 Hun, 163.) The position taken by the General Term of the Supreme Court is untenable. (*Wilson v. Tumman*, 6 M. & G. 236; *Hamlin v. Sears*, 82 N. Y. 327; *M. Bank v. Livingston*, 72 id. 223.)

J. A. Dennison for plaintiff. Savin & Vanderhoof were trustees of all the stocks so pledged for the following purposes: For themselves to the extent of their debt (if they were *bona fide* holders, which is not admitted); for Smith to the extent of his stock, and for O. M. Bogart & Co. or their assignee for the surplus. (*Wheeler v. Newbold*, 16 N. Y. 392, 398; *Hayes v. Ward*, 4 Johns. Ch. 122, 129; *Schroppell v. Shaw*, 3 N. Y. 56, 57; *Grow v. Garlock*, 14 Abb. [N. C.] 487, 492; *Farwell v. I. Bank*, 90 N. Y. 483; *Gould v. C. T. Co.*, 23 Hun, 322.) The defendants Savin & Vanderhoof did not sell according to the rules of law governing the

rights of pledgor and pledgee; such sales can be made only on due and reasonable notice of the time and place thereof, and must be at public auction. (*Myers v. M. N. Bank*, 27 Abb. [N. C.] 266; *Baker v. Drake*, 66 N. Y. 518, 522; *Gruman v. Smith*, 81 id. 25, 28; *Gillett v. Whiting*, 120 id. 402; *Markham v. Jaudin*, 41 id. 235; *Brass v. Worth*, 40 Barb. 648, 653, 654; *Miliken v. Dehon*, 27 N. Y. 364; *Wheeler v. Newbold*, 16 id. 392; *Genet v. Howland*, 45 Barb. 560-563; *Ogden v. Lathrop*, 65 N. Y. 158-162; *Rankin v. McCullough*, 12 Barb. 103-107; *Dykens v. Allen*, 7 Hill, 497, 499, 500.) Whether the plaintiff Smith was entitled to notice or not, and whether Savin & Vanderhoof had notice of his rights or not makes no difference in this case, and cannot affect the judgment to the advantage of the defendants. (*Vose v. Woods*, 26 Hun. 486-488; *Kerr v. Mount*, 28 N. Y. 659, 666; *Day v. Bach*, 87 id. 56-61.) Defendants' contention that the plaintiff was not entitled to recover in this action, because by the previous proceedings therein he had elected a remedy other and different from that sought to be now enforced is untenable. (Code Civ. Pro. § 723; *Degrav v. Elimor*, 50 N. Y. 1; *Ward v. Kalbfleisch*, 21 How. Pr. 283; *Terry v. Munger*, 121 N. Y. 161; *E. C. F. Co. v. Hessee*, 103 id. 25; *Fowler v. B. S. Bank*, 113 id. 450; *Bock v. Tuck*, 126 id. 53.) Savin & Vanderhoof were trustees of this stock for the benefit of the surety as well as themselves; parting with it without the knowledge or consent of the surety discharges their claim against the surety to the value of the stock illegally sold. (Baylies on Sureties & Guar. 237, 238; *Phares v. Barbour*, 49 Ill. 370-373; *Hayes v. Ward*, 4 Johns. Ch. 122, 129; *Schroppell v. Shaw*, 3 N. Y. 446-457; *Grow v. Garlock*, 14 Abb. [N. C.] 487-492.) This court has power, and it is its duty, to direct the modification of the judgment so as to conform the same to the facts found, by applying the proper rules of law thereto. (*Outwater v. Moore*, 124 N. Y. 66; *Brackett v. Griswold*, 128 id. 644, 648; *Price v. Price*, 33 Hun, 432; *Wood v. Baker*, 60 id. 337.)

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John Notman for defendant Wheeler. The defendants Savin & Vanderhoof cannot offset the surplus arising, after the assignment was made, from the sale of the securities pledged to them over and above the amount of their two loans of \$50,000 each, interest and expenses of sale, the deficiency on the borrowed and loaned stock transactions ascertained and fixed after the assignment when those transactions were closed out to the defendant assignee. (*Beckwith v. U. Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 id. 489; *Roberts v. Carter*, 38 id. 107; *Martin v. Kunzmüller*, 37 id. 396; *Westlake v. Bostwick*, 3 J. & S. 256, 261; *Murray v. Deyo*, 10 Hun, 1, 6; *Bradley v. Angell*, 3 N. Y. 475.) The plaintiff is only entitled to such proportion of the surplus arising out of the loan in which his 100 shares of Missouri Pacific railroad stock entered as the proceeds of such stock, on the sale, bore to the whole value of all the securities in that particular loan. (*Gould v. C. T. Co.*, 6 Abb. [N. C.] 381.)

PECKHAM, J. The defendants Savin & Co. make a preliminary objection to the maintenance of this judgment on the ground that the plaintiff has elected by the form of his original complaint to treat the sale of the stocks as a valid and regular sale, and assuming its validity he has asked to recover from defendants Savin & Co. only the amount which they received from such sale. The present form of the action the defendants say is inconsistent with the original, for the reason that the cause of action as now set up is based upon the alleged illegal character of the sale of the plaintiff's stock and the consequent liability of the defendants to pay him the damage he has thereby suffered.

The plaintiff at the time of the commencement of the action supposed that the defendants had realized enough upon the sale of the other stocks to repay them the amount of the call loan, and that the only claim they made upon his stock was the right to apply it on other indebtedness. He also supposed his stock had sold for \$9,000, and he demanded that sum from Savin & Co. It seems he was mistaken as to these

facts; the other stocks did not realize upon their sale enough to pay the debt due defendants, nor did his stock sell for \$9,000, and the defendants claimed the right to hold his stock for the balance of the call loan debt, and then to hold what was left as payment on account towards other indebtedness of Bogart & Co. to them. The plaintiff was also ignorant of the fact that the sale of the stocks was made without notice and in violation of the rules of the stock exchange. As the plaintiff commenced his action in ignorance of these material facts, he ought not to be held as conclusively ratifying these alleged illegal sales, simply because while thus ignorant his complaint proceeded upon the ground of the validity of such sales and asked for the proceeds arising therefrom so far as his own stock was concerned.

When he became informed of the facts, after the action had been referred, we do not think that he lost his right to repudiate the validity of the sale by going on under the original complaint. It is evident, from the finding of the referee, that the plaintiff supposed he could then, and under the original complaint, prosecute the defendants for their wrongful and illegal sales, which he had then discovered, and to that end he gave evidence of the rules of the stock exchange, and upon appeal to the General Term the plaintiff still entertained such belief and claimed such right. When the courts decided against him upon that view, he then asked for an amendment, and, upon payment of all the costs incurred by all the defendants up to the time of the motion, he was permitted to amend his complaint. Under these circumstances we are of the opinion that there was no such election, with knowledge of all the facts proved in this case, as would preclude the plaintiff from insisting, under his amended complaint, upon the invalidity of the sale of his stock.

We must come, therefore, in this case to a consideration of its merits.

The defendants Savin & Co. must be treated as *bona fide* pledgees of the stock as a portion of their collateral security for the payment of the \$50,000 call loan.

Some criticism was made upon the argument based upon the fact that the scrip for the 100 shares of Missouri Pacific had been issued in the name of the plaintiff, and the power of attorney to transfer the same was a detached paper, and the plaintiff's signature thereon was not acknowledged by plaintiff before a notary public, as required by the rules of the stock exchange, in order to make a good delivery upon a sale under those rules. This fact we regard as wholly immaterial for the purpose of charging the pledgees with notice of any defect in the title to the scrip on the part of the sub-pledgor. The power of attorney was full and complete for the purpose of transferring the right to the pledgees to demand of the railroad company a transfer of the scrip upon its books to the pledgees. A failure to comply with some rule of the stock exchange, in order to constitute a good delivery of the stock under the rule, has no significance upon the question of the good faith of the pledgee, and constitutes no notice to him which should put him upon inquiry as to the right or title of the pledgor.

There is no other evidence in the case that the defendants Savin & Co. were not *bona fide* pledgees, and we must hold that they were such with all the rights which such a position gave them. It would appear to be also immaterial whether the loan and the pledge of the securities were made under the rules of the stock exchange or subject to the ordinary rules appertaining to a pledge as collateral security for a loan of money. In either case the sale was in violation of the law upon the subject. The question before us is what are the rights of the plaintiff in the light of the circumstances above set forth?

When the pledge was made to them the defendants were entitled to regard Bogart & Co. as the owners of all the stock which was pledged, but when the plaintiff (being in fact the owner of the stock) notified the defendants of his rights before any sale was made by them, the plaintiff then stood, with reference to that stock, as a simple surety for the payment of the loan and with the right on his part to compel Savin & Co.

to apply the proceeds of the other securities held by them before resorting to the stock owned by him. (*Farwell v. Importers', etc., Nat. Bank*, 90 N. Y. 483.) The right of property in the stock did not pass to Bogart & Co. by the deposit made of it with them by plaintiff as security, and of course it did not pass to Savin & Co. by reason of the deposit thereof by Bogart & Co. This right of property remained with the plaintiff, subject to the lien of Bogart & Co., and after their pledge to defendants, subject to defendants' lien also. (*Wheeler v. Newbould*, 16 N. Y. 392, 398.)

This action is in effect an action to recover damages for the conversion of the 100 shares of plaintiff's stock. After his notice to defendants of his ownership of that stock, the plaintiff had the right simply to demand that the other stock for which his own was security, should be sold for its full value. He stood in no such position with regard to the other stock, of which he was not the owner, as would entitle him to complain that it had not been sold in accordance with the stock exchange rules, so long as it was in fact sold for its full value on the day of its sale. If the rules had been observed the stock might even then have been sold on that day and at that place. So long as it was in fact sold for its full value the plaintiff cannot complain.

There is no finding and no proof that this stock was not so sold.

So far as appears the only difference between the sale that actually took place and that which might have taken place if the stock had been sold "under the rule," is that in the latter case the sale would have been made by one of the officers of the exchange at a certain hour of the day and at public auction.

The price actually received was as high as the price of any stock of that kind reached that day; at least there is no evidence that it was not, and it would appear that the price actually received for the stock was its market value at that time. This was all that the plaintiff could require in regard to stock which he never owned or had possession of.

If the defendants, by reason of the violation of the stock

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exchange rule, laid themselves open to a charge of conversion as in favor of Bogart & Co. or their assignee, with reference to the stock owned by them, such cause of action was a matter of no legal interest to plaintiff so long as that stock then sold for its full value, and he could not, at any rate in such an action as the one he has brought, insist upon charging Savin & Co. with the highest price of stock which he never owned, as he now claims is his right. Whatever cause of action Bogart & Co. might have for an illegal sale belongs to them and cannot be set up by plaintiff as an affirmative claim on his part. (*Gillespie v. Torrance*, 25 N. Y. 306.)

In regard to the stock owned by plaintiff, however, he had the right, by reason of his ownership and because of the wrongful act of Bogart & Co. in pledging such stock, to insist that the defendants Savin & Co. should abide by their contract of pledge, and that they should sell his stock in strict accordance with the law, and in case of a violation of duty on the part of defendants which resulted in an illegal sale of the plaintiff's stock, he had the right to complain of such violation and to sue to recover damages therefor.

The plaintiff in fact was not indebted to Bogart & Co. when they unlawfully pledged his stock, and they had no right as against plaintiff to claim or take possession of his stock from the hands of Savin & Co. The latter had their lien on it as security, and subject to that lien the plaintiff was the owner. The defendants Savin & Co. having violated the law in selling the stock as they did, without notice to their original pledgors or their assignee, the plaintiff, by reason of his ownership of the stock, could thereafter treat such sale as a conversion, and after the proceeds of the sale of the other stock were applied towards the payment of the debt of Bogart & Co. to defendants, the plaintiff had the right to claim the highest price which his stock reached within a reasonable time after its illegal sale by defendants (*Wright v. Bank, etc.*, 110 N. Y. 237), and from that sum should be deducted the balance of the debt due from Bogart & Co. to Savin & Co. I should say that in general the time elapsing between the

14th of May and the 21st of the following June was much more than a reasonable time in which to purchase back stock of this kind when it had been illegally sold, but the fact appears that the plaintiff was not aware of such sale until about near the latter date, and in such case the time allowed to take the highest price is of course not unreasonable.

The defendants cite the case of *Thompson v. St. Nicholas Natl. Bank* (113 N. Y. 325) as conclusive in their favor and as showing entire absence of all liability on their part to plaintiff. I do not think the case is in point. The pledgee had by the contract in question in that case full power to sell at public or private sale and without notice, and power to apply the proceeds in payment of the indebtedness for which the pledge was security. This right was not affected by notice from the original plaintiff that he owned the bonds, and he had no right to forbid defendant to part with the stock in the manner which it was authorized to do by its contract with the pledgor. The defendant did sell in a valid manner in the *Thompson* case, while in this case the defendants sold in an illegal manner and were thus technically guilty of a conversion. We may assume here that the plaintiff in the *Thompson* case obtained no right by his notice to the defendant to insist that it should only sell after notice to him. The defendant was a *bona fide* pledgee for value of the bonds, and at the time when the loan was made and the bonds pledged, the contract was made providing for a sale without notice and at private sale or by auction. This privilege was part of the security, and the plaintiff could not by any notice impair that security or alter the right which defendant had obtained by its contract made at the time when the loan was effected and the securities pledged. But the fact that the defendant in that case had the right originally under its contract to make and did make a valid sale without notice to the plaintiff therein, furnishes no ground for permitting the defendants here to make an illegal sale of the plaintiff's stock without responding in damages to him on account of such illegal act. The illegal sale by these defendants consists (aside from the question of a

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lack of a proper demand of payment on Bogart & Co., or their assignee) in an omission of any notice of sale to Bogart & Co., or their assignee, and also of a sale in violation of the rules of the stock exchange. And the plaintiff by reason of his ownership can take advantage of that violation of law on the part of the defendants and sue for this conversion of his stock. The *Thompson* case was not decided in favor of the defendant bank while assuming that it had sold the bonds in violation of the rights of Capron and Merriam, their pledgors. On the contrary, the reasoning of the case shows it was assumed the sale had been properly made so far as their rights were concerned. And therein lies the important difference in the facts in the two cases. In the *Thompson* case the sale was proper and in this case it was not.

The deduction of the balance of the indebtedness of Bogart & Co. to defendants Savin & Co., from the price allowed for plaintiff's stock, is proper because the stock was originally pledged for that debt, and although the defendants by their mode of sale were guilty of a technical conversion of the stock to their own use, yet the result of such conversion resolves itself into a question of damage; what damages has the plaintiff suffered by reason of this conversion? And, we think, upon that question it is proper to deduct what remains of the debt for which the plaintiff's stock originally stood as security, from the highest amount for which the stock sold within a reasonable time after its conversion. (*Wright v. Bank of Metropolis*, 110 N. Y., *supra*, and cases cited; *Minor v. Beveridge*, decided at this term.)

As to the defendant Wheeler, the assignee of Bogart & Co., we think he has no cause of complaint in this case. The judgment bars him of all right to the stock in question or to any portion of the proceeds thereof. After Bogart & Co. ceased to be creditors of the plaintiff, neither they nor their assignee had any further interest in this stock. The referee finds that plaintiff was not equitably indebted to Bogart & Co. in any sum whatever after the 8th day of May, 1884. They were not in fact creditors after that date.

The judgment should be affirmed as against all appellants, without costs in this court in favor of any one.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. BENJAMIN W. WOOSTER, Respondent, v.
EDWARD A. MAHER, Mayor, etc., Appellant.

While a mandamus against a public officer or municipality is a proper remedy to compel the performance of a ministerial duty, plainly prescribed, and that remedy may be invoked in behalf of any person interested in its performance, in case of failure to perform the duty, where the officer or body is clothed with a discretion either to do or omit to do the act, a mandamus can only issue to compel a decision, in case of refusal to decide, and where a decision has been made the court cannot, on mandamus, review the decision or compel one the other way.

It seems, the authorities of a city cannot legalize an obstruction of a city street so as to bar the public right, and a building projecting into a street, although originally built with the consent of the city, is an unlawful obstruction and a public nuisance, and the user, although long continued, is no obstacle to proceedings for its removal.

Under the provision of the charter of the city of Albany (§ 11, tit. 13, chap. 298, Laws of 1883), as amended in 1888 (Chap. 398, Laws of 1888), requiring the city engineer, where a building projects into the street, "upon the receipt of written directions from the mayor," to take summary proceedings for the removal thereof, a discretion is given to the mayor to determine in any given case whether or not such proceedings shall be instituted.

Accordingly *held*, that the court had no power to compel the mayor by mandamus to initiate such proceedings by giving the prescribed notice to the engineer; and that the discretion of the mayor in this respect was not affected by a resolution of the common council requesting him to take proceedings for the removal of the obstruction.

It seems, the common council, as commissioners of highways, might institute proceedings appertaining to their functions as such, for the removal of the obstruction.

(Argued February 6, 1893; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made July 2, 1892, which affirmed an order directing the issuance of a peremp-

tory writ of mandamus which required defendant, as mayor of the city of Albany, to send written directions to the city engineer of the city of Albany to send written notice to the owner or person who erected or is now maintaining said porch or building as aforesaid, within ten days after receipt of said notice to remove the said building or porch, as aforesaid, to the range of the street laid down by the city engineer, under and pursuant to the provisions of section 11 of title 13 of chapter 298, Laws of 1883, as amended by section 10 of title 13 of chapter 398, Laws of 1888.

The facts, so far as material, are stated in the opinion.

Matthew Hale for appellant. The statute under which the mandamus was granted imposes no duty upon the mayor to give written directions to the city engineer. This is a matter within his discretion, and no mandamus lies to compel its performance. (*Holland v. Eldridge*, 43 N. Y. 457, 461; *People ex rel. v. Vil. of Saratoga Springs*, 54 Hun, 16, 20, 21; *People ex rel. v. Grant*, 58 id. 455; *People ex rel. v. Grant*, 126 N. Y. 473, 482; *People v. Chapin*, 103 id. 635; 104 id. 96; *People v. Barnes*, 114 id. 317, 326; *Noble v. U. R. R. Co.*, 147 U. S. 165, 171; *Cogswell v. N. Y., N. H. & H. R. Co.*, 105 N. Y. 319; 2 Dillon on Mun. Corp. § 639.) The peremptory writ should have been refused, because the term of office of the defendant had expired, and he was no longer mayor, and had no power to execute the writ at the time of the trial. (*People v. Suprs.*, 12 Barb. 217; *People v. Reardon*, 49 Hun, 425; *Secretary v. McGarrahan*, 9 Wall. 298; *U. S. v. Boutwell*, 17 id. 604; *People v. Excise Commissioners*, 7 Abb. Pr. 34; *People v. Board of Education*, 33 N. Y. S. R. 30.) Upon the merits and irrespective of the points above suggested, the judgment appealed from was erroneous. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98, 107; *Conkling v. N. Y., O. & W. R. Co.*, 102 id. 107; *Rauenstein v. N. Y., L. & W. R. Co.*, 136 id. 528; *Hoey v. Gilroy*, 129 id. 132; *Woodruff v. Paddock*, 56 Hun, 228, 291, 292; 130 N. Y. 618; *Ludlow v. Oswego*, 25 Hun, 260.)

Franklin M. Danaher for respondent. The relator was entitled to a peremptory writ of mandamus as a matter of right. (*People ex rel. v. Canal Appraisers*, 73 N. Y. 443; § 10, chap. 298, Laws of 1883; chap. 398, Laws of 1888.) An appeal will not lie to the Court of Appeals from a judgment of the Supreme Court awarding a mandamus, because the granting or refusal of the writ was in the discretion of that court, and it not appearing that that discretion has been abused, this court will not interfere to review the proceedings. (*People ex rel. v. Jeroloman*, 139 N. Y. 14; *In re Dederick*, 77 id. 595; *In re Sage*, 70 id. 223; *People ex rel. v. Ferris*, 76 id. 326; *People ex rel. v. Campbell*, 72 id. 497; *People ex rel. v. Board of Police*, 107 id. 239.) Any projection that interferes with the public right to use the street to its entire width, including sidewalks, is an obstruction and a public nuisance. (*Flynn v. Taylor*, 127 N. Y. 596; *Cohen v. Mayor*, 113 id. 535; *People v. Thompson*, 98 id. 6; *Callanan v. Gilman*, 107 id. 365; *Clifford v. Dam*, 81 id. 56; 20 Abb. [N. C.] 387; 2 Gray, 265, 270; 107 Mass. 234; *Hume v. Mayor*, 74 N. Y. 264; *Story Case*, 90 id. 124; 38 How. 67; 51 N. Y. Super. Ct. 1; Penal Code, §§ 385, 387; 15 Abb. [N. C.] 250; 18 id. 124; 59 How. 277, 333; 12 Abb. [N. C.] 124; 52 N. Y. Super. Ct. 463; 5 N. Y. Supp. 580; 14 N. Y. 506, 524; 28 id. 396.) The permission given by the city of Albany to the trustees of the Albany Female Academy to erect the porch or portico of their building twelve feet beyond the range of the west side of North Pearl street, was *ultra vires* and absolutely null and void, and gave the academy no rights in the street. (*S. V. O. Asylum v. City of Troy*, 76 N. Y. 108; *Story Case*, 90 id. 112; *Mahady Case*, 91 id. 148; *Lahr Case*, 104 id. 268, 292; *Cohen v. Mayor*, 113 id. 532; *Abendroth Case*, 122 id. 1; *Reining Case*, 128 id. 157; *Hughes Case*, 130 id. 14; *Eyerer Case*, Id. 112; *In re Buffalo*, 131 id. 293, at 298, 299; *Williams Case*, 126 id. 96; *People ex rel. v. Thompson*, 98 id. 11; *Milhau v. Sharp*, 27 id. 611; *Williams v. N. Y. C. & H. R. R. Co.*, 16 id. 97; *M. E. Co. v. Newton*, 4 N. Y. Supp. 593; 2 Dillon on Mun. Corp. § 660.)

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Statement of case.

The academy having been put into possession of the land under a written license from the city which asserted the public title, is estopped and precluded from questioning the city title in an action to recover possession of the same. (*Denning v. Roome*, 6 Wend. 656; *Bedlow v. N. Y. F. D. D. Co.*, 112 N. Y. 285; Washb. on Real Prop. 482; *Goode v. Gaines*, 145 U. S. 141.) The license was revocable and was rescinded in 1889, and no equitable estoppel arises because of acts done or money expended under it. (*White v. M. R. Co.*, 139 N. Y. 19.) Neither limitations nor adverse possession runs against the public in this matter. The time of occupancy gave no rights to the academy in the street. The public easement was not extinguished by adverse possession, nor was the authority of the public officers to remove or abate it. (*Bedlow v. N. Y. C. R. R. Co.*, 112 N. Y. 265; *S. V. O. Asylum v. City of Troy*, 76 id. 108; *Driggs v. Phillips*, 103 id. 82; *Bliss v. Johnson*, 94 id. 241; *Galway v. M. E. R. R. Co.*, 128 id. 144; *Pappenheim v. M. E. R. R. Co.*, Id. 436.) Relator's public rights in the streets which are co-extensive with the exterior bounds thereof, as seen, irrespective of any question of title, have been diminished by the porch. (*Cohen v. Mayor*, 113 N. Y. 535; *Driggs v. Phillips*, 103 id. 82; *Kellog v. Thompson*, 66 id. 88; *Clifford v. Dam*, 81 id. 56; *Bliss v. Johnson*, 94 id. 235, 241; *Craig v. Rochester*, 37 id. 411; *Com. v. Blairdell*, 107 Mass. 234; *Hyde v. Middlesex*, 2 Gray, 270; Wood on Nuisances [2d ed.], § 250; 113 N. Y. 535; 33 Hun, 301; *Flynn v. Taylor*, 127 N. Y. 596.) Relator's private property rights in and to North Pearl street have been curtailed by the academy porch. (*Flynn v. Taylor*, 127 N. Y. 596; *Callanan v. Gilman*, 107 id. 370; *Western v. McDermott*, L. R. [1 Ch. Div.] 499; Wood on Nuisances, §§ 777, 780.) The mayor had no discretion in the premises; his power was statutory and his duty peremptory, and he violated both when he refused to act (1) of his own volition upon proof that the portico projected beyond the range of the street; (2) when ordered so to do by a law of the city of Albany; (3) on demand of relator. The power to do

and act makes it the duty of the officer to execute the power, and where he refuses to act mandamus will compel him to; though the language used in the statute is permissive, the duty is peremptory. (*Minor v. M. Bank*, 1 Pet. 46; *City of Galena v. Amy*, 5 Wall. 705; *Wright v. Evans*, 2 Abb. Pr. [N. S.] 308; *Lord Manner v. Johnson*, L. R. [1 Ch. Div.] 673; *Western v. McDermott*, Id. 499, 502; *Stevens v. Gourlay*, 7 C. B. [N. S.] 112; *Olmstead v. McNall*, 7 Blackf. 387, 388; *King v. Gregory*, 5 Bar. & Ad. 555; *Watson v. Cotton*, 5 C. B. 51; *Bank v. Supervisors*, 138 N. Y. 95; High on Mand. § 416; *People v. Halsey*, 37 N. Y. 348; *Hart v. Mayor, etc.*, 9 Wend. 570 (n); *Milhan v. Sharp*, 27 N. Y. 612; *People ex rel. v. Supervisors*, 56 id. 252; *People v. Collins*, 19 Wend. 56, 65; *Groat v. Moak*, 94 N. Y. 128, 129; *People ex rel. v. Duley*, 37 Hun, 461.) If it should happen that the court decides that the mayor has discretionary power in the premises, mandamus will issue to compel the exercise of official discretion, especially where the discretion is abused and made to work injustice, or where the officer appears to be acting in bad faith. (14 Am. & Eng. Ency. of Law, 98, 99, 166; Merrill on Mandamus, §§ 37, 38-41.) The action does not abate by the expiration of Maher's term of office; the writ, if issued, runs to his successors notwithstanding. The fact that Maher's term of office has expired, not having been pleaded, is not before the court. (*Styles v. Fuller*, 101 N. Y. 622; *Thompson v. U. S.*, 103 U. S. 480, 485; *People v. Champion*, 16 Johns. 61; *People v. Collins*, 19 Wend. 56; High on Ex. Rem. § 38; *People v. Suprs.*, 8 N. Y. 330; *County Commissioner v. Sellew*, 99 U. S. 624, 628; *State v. Warner*, 55 Wis. 271; *State v. Pickett*, 7 Lea, 709; *People v. Treas.*, 37 Mich. 351; *Muddox v. Graham*, 2 Mete. 56; *People v. Supervisors*, 100 Ill. 332; *South v. City of Madison*, 15 Wis. 30, 31; *Pegram v. Comrs.*, 65 N. C. 114; *Hardie v. Gibbs*, 50 Miss. 604.) The word "as" between Maher's name and the title of the office would be surplusage and unnecessary, and is no part of the title of the action; its absence does not indicate a personal action against

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MAHER. Where the writ describes and avers the representative character of the person the word "as" is not a part of the title. (*Thompson v. U. S.*, 103 U. S. 480-485; *City v. Kinney*, 9 id. 628; *Litchfield v. Hunt*, 104 N. Y. 550.) Chapter 311, Laws 1861, entitled "An act to amend the Revised Statutes in respect to highways," is not applicable. (*In re Lexington Ave.*, 29 Hun, 305; 92 N. Y. 629; *In re Woolsey*, 95 id. 141; *In re Mayor*, 34 Hun, 445; *Cook v. Harris*, 61 N. Y. 455; *Driggs v. Phillips*, 103 id. 77; *Walker v. Capwood*, 31 id. 51; *S. F. O. Asylum v. City of Troy*, 76 id. 114.) Defendant's exceptions to the findings of fact present no questions reviewable by this court. The findings he excepted to are supported by the evidence; the refusal to find an abandonment is not error, because it has no pretense of any proof to support it. (*Bedlow v. F. D. D. Co.*, 112 N. Y. 263; *Hunnigan v. Allen*, 127 id. 639; *Wetmore v. Bruce*, 118 id. 320; 71 id. 137; 79 id. 224; 109 id. 316, 526.) Defendant's exceptions to the admission of evidence present no reversible errors. (*Lerche v. Brushner*, 104 N. Y. 161; *Kane v. N. Y. C. R. R. Co.*, 125 id. 187.)

ANDREWS, Ch. J. This is a proceeding by mandamus, and the judgment from which the appeal is taken directs the mayor of the city of Albany to give written directions to the city engineer to notify the owner of the building on Pearl street known as the Albany Female Academy to remove the porch of the building, which the judgment finds projects thirteen feet and four inches into Pearl street, within ten days after receipt of the notice, pursuant to the provisions of section 10, title 13 of chapter 298 of the Laws of 1883, as amended by chapter 398 of the Laws of 1888.

The question whether the porch projected into the street and the extent of the alleged encroachment was litigated on the trial. If the affirmance of the judgment depended on the question whether in fact the alleged encroachment existed, we should have no difficulty. Upon the facts found and proved there can be no reasonable doubt that the porch is an unlaw-

ful obstruction in the street and a public nuisance. Although originally built with the consent of the city, the municipality could not legalize the structure so as to bar the public right, and the user, though long continued, is no obstacle to proceedings for its removal. All the remedies, public and private, for the abatement of encroachments in highways or public streets, are open and unaffected by the colorable authority under which the porch was erected, or by acquiescence in the unlawful user. (*St. Vincent's Orphan Asylum v. City of Troy*, 76 N. Y. 108, and cases cited.) But the question here is whether, under the provision of the city charter referred to in the judgment, the mayor of the city may be compelled, under the coercion of a writ of mandamus, to direct the city engineer to give the notice therein specified. When such direction is given by the mayor, either voluntarily or by compulsion, the duty imposed on the city engineer is mandatory and imperative. Upon receiving such direction he must give the notice of ten days to the owner, and if the owner neglects or refuses to comply with the notice, he must then cause such removal to be made, in the first instance at the expense of the city, to be reimbursed by an assessment on the property of the owner. The city engineer would have no discretion, but would be bound to act in accordance with the peremptory direction of the statute. Is the authority given to the mayor to initiate these summary proceedings, by directing the city engineer to give notice to the property owner, also a mandatory duty, or was it the intention of the charter to leave it to his judgment and discretion whether this method of enforcing the public right should be pursued? The right to proceed against the mayor by mandamus depends upon the answer to this question. There is no dispute as to the rule of law that a mandamus against a public officer, or a municipality, is a proper remedy to compel the performance of a ministerial duty plainly prescribed, and may be invoked in behalf of any party interested in its performance, on the failure of the officer or public body to do the act or thing required. But where the officer or body is clothed with a discretion, and it may do or

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omit to do the act or thing according to the judgment of the person or body authorized to act, then a mandamus can only issue to compel a decision, in case of a refusal to decide, and when a decision is made the remedy by mandamus ends. The court cannot on mandamus review the decision made, or compel a decision the other way, because the court may disagree as to the justice or propriety of the conclusion reached. The broad distinction is between duties mandatory and peremptory and those involving discretion and judgment. In the one case the public agent cannot refuse to act, or to do the thing required, and in the other the court is not permitted to substitute its judgment for that of the officer or body clothed by the law with the power to decide. There is sometimes difficulty in determining whether a duty is peremptory or discretionary. Language permissive in form is sometimes construed as imperative in meaning. It is not infrequent that a statute declares that it shall be lawful for an officer or body to do this or that, or that this or that thing may be done, using language which in ordinary acceptation imports permission, and not command, and in many such cases the duty is held to be imperative. It is a question of the real meaning of the legislature to be ascertained from a consideration of the nature of the authority, the character of the public agency, and the public duty involved. For example, it has frequently been held that where authority is given to raise money by taxation for public purposes or to discharge a municipal obligation, the duty to exercise the authority may be imperative, although conferred in permissive language. On the other hand, there are many occasions for vesting in public agencies actual discretion in respect to the exercise of powers conferred, because the legislature cannot always anticipate the circumstances which may call for their exercise, or which may require that they should be held in abeyance. (*People ex rel. v. Fairchild*, 67 N. Y. 334; *People ex rel. Hammond v. Leonard*, 74 id. 443; *People ex rel. Francis v. City of Troy*, 78 id. 33; Dillon on Municipal Corporations, § 98; High on Extraordinary Rem. §§ 24, 42.)

In the light of these familiar principles we are to consider whether the mayor of Albany had a discretion to refuse to issue the direction to the city engineer, which the judgment below requires him to give. It appears by reference to the charter of Albany (Laws of 1883, chap. 298) that the original section relating to the summary removal of buildings projecting into streets is one of the sections of title 13, entitled "city engineer and surveyor." This title prescribes the duties of that officer, and the section as originally passed contained no reference to the mayor, and conferred upon him no authority or duty, but left it to the engineer and surveyor on his own motion to institute the proceedings (§ 11). This general and unguarded power might lead to very grave consequences, and place upon the city onerous responsibility. The amendment of 1888 (Chap. 398, title 13, § 10) for the first time made the mayor a necessary party to any proceedings instituted for the summary removal of buildings standing upon or encroaching on the streets. The amendment provided that the city engineer "shall, upon the receipt of written directions from the mayor," send written notice, etc. It took from the city engineer the power to institute the proceedings independently of the mayor, which he possessed under the original section, and made the preliminary direction of the mayor essential before any action should be taken by the subordinate officer. It is, we think, quite manifest from the history of this provision, as well as from its language, that it was the intention of the legislature to confide to the mayor the determination whether summary proceedings under that section should be commenced in a given case. There was great propriety in this. The city, if it proceeded to tear down buildings under this section, would do so at the hazard of being able to justify the act by showing that the encroachment in fact existed, and to the extent of such interference. The decision of the mayor would not bind the property owners. The owners whose buildings were threatened with demolition, might upon cause shown to the satisfaction of the court procure an injunction. But they would not be bound

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to do so, but might await the trial of the right in an action for damages. The city had other remedies by ordinary procedure at law to remove the obstruction, in pursuing which it would incur no hazard. It seems to us that it was the plain intention of the section, as amended, to confide to the judgment and discretion of the mayor the determination of the question whether proceedings should be taken under this section of the charter, and if this is the true meaning of the statute, the court had no power by mandamus to compel him to initiate such proceedings.

We think the situation was not changed by the resolution of the council passed April 15, 1889. That resolution was in form a request by the council to the mayor to take proceedings for the removal of the porch under the section in question. It was adopted in pursuance of the report of the law committee of the council previously made, in which report it was said: "The passage of this resolution will, however, operate simply as a recommendation to the mayor, with whom the matter is discretionary." It is reasonable to suppose from the form of the resolution adopted that it was acted upon in this view. The statute left the matter to the judgment of the mayor, and the council could not change the character of the duty imposed and make that mandatory which under the statute was discretionary. The common council as commissioners of highways might institute proceedings appertaining to their functions as such, but the power to change the statute was not among them.

These views lead to a reversal of the order below. Judgment of Special and General Terms reversed and proceedings dismissed, with costs against relator.

All concur.

Judgment reversed.

ANTOINETTE L. MILBANK, Individually, etc., Respondent, v.
MORGAN JONES, Appellant.

Under a general denial in an action on contract, defendant may controvert by evidence anything which plaintiff is bound to prove in the first instance to make out his cause of action, or **anything** he is permitted to prove for that purpose.

When in such an action plaintiff is permitted to prove a cause of action other than that set forth in the complaint, defendant is entitled to the benefit of any defense he may have to the cause of action established. The pleadings will be regarded as amended so as to conform to plaintiff's proof on the one hand and to cover any proof defendant may offer which answers or defeats the case made against him; and so, defendant is entitled to show that the cause of action was satisfied, extended or modified in such a manner as to defeat any right of action upon it.

Plaintiff's complaint alleged in substance the receipt by defendant of \$5,000 to be held in trust for plaintiff, the trust to be terminated at the election of the latter on or after a day specified; that after that day plaintiff notified defendant of his election to terminate the trust and demanded the money, which defendant refused to pay. The answer was a general denial. Upon the trial plaintiff was permitted to prove an agreement by which defendant acknowledged receipt of the sum specified, which he agreed to return to plaintiff in case a certain resolution of the common council of New York city should not pass and take effect before a day specified. Defendant offered to prove that plaintiff, subsequent to the making of the agreement, extended the time for the passage of the resolution; that it was passed and went into effect on the day specified; that defendant delivered to plaintiff a certified copy thereof, and that the latter accepted it as performance. This was objected to and excluded. *Held*, error.

(Argued January 30, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 6, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Fettretch and *John M. Jones* for appellant. Defendant must, under a general denial, be permitted to controvert

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by evidence everything which the plaintiff is bound, in the first instance, to prove to make out his cause of action. (*Griffin v. L. I. R. Co.*, 101 N. Y. 354; *Wheeler v. Billings*, 38 id. 264.) Defendant was entitled to defeat the plaintiff's intestate's claim by showing that he had no cause of action at the time the action was commenced. (*Gilman v. Gilman*, 111 N. Y. 265; *Andrews v. Bond*, 16 Barb. 633-641; *Raynor v. Timerson*, 46 id. 525; *Creeque v. Sears*, 17 Hun, 125; *Benson v. Hatch*, 43 id. 146.) Any evidence to disprove the allegations of the complaint was competent on the part of the defendant in denial and not as an affirmative defense. (*Dietrich v. Dreutel*, 43 Hun, 342; *Hebbard v. Haughian*, 70 N. Y. 59.) The plaintiff having given proof of a cause of action not pleaded, the defendant was entitled to defeat it by any evidence which he had under his control irrespective of his answer. (*Arnold v. Angell*, 62 N. Y. 512.) Defendant was entitled to go to the jury on the claim of the defendant that the trust had been terminated by the plaintiff on July 10, 1866. (*Lawrence v. Simons*, 4 Barb. 354, 358, 359.) It is not necessary to plead that the contract sued upon, whether in writing or verbal, was against public policy or public morals, but the defendant may, without pleading it, raise the question, upon the suggestion of the fact of the real character of the contract. However made to the court, the court should take knowledge of it and permit the facts to be proved, and either dispose of it by direction where the facts are undisputed, or submit the question to the jury, where it is one of fact, whether or not the contract is against public policy and public morals. (*Coppell v. Hall*, 7 Wall. 542; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Lee v. Johnson*, 116 id. 52; *Richardson v. Buell*, 77 Mich. 656; *Bottomly v. U. S.*, 1 Story, 135; *Martin v. Wade*, 37 Cal. 174, 176; *Twist v. Child*, 21 Wall. 450, 452.) It matters not that the evidence bringing the case within the rule of *malum in se* required the defendant to give proof of facts as to which the plaintiff had given no evidence. (*O'Brien v. McCunn*, 58 N. Y. 376; *Nellis v. Clark*, 20 Wend. 24.)

Ira Shafer and *William H. Hamilton* for respondent. That the present plaintiff was properly substituted, and has title in both a representative and an individual capacity, was conclusively determined by the order of November fourteenth, which revived and continued the action. No new pleadings were necessary. (*Moore v. Hamilton*, 44 N. Y. 672; *Smith v. Zalinski*, 94 id. 519; *Gibson v. A. P. Bank*, 98 id. 87; *Greenwood v. Marvin*, 111 id. 423.) The decision of the Court of Appeals is the law of this case on all other questions raised at the trial. (*Moore v. M. N. Bank*, 18 N. Y. Supp. 296; *Milbank v. Jones*, 127 N. Y. 370; *Corn v. Rosenthal*, 22 N. Y. Supp. 700.) Illegality, if proved, would constitute no defense. (*Kinsman v. Parkhurst*, 18 How. Pr. 289; *Brooks v. Marvin*, 2 Wall. 81; *P. Bank v. U. Bank*, 16 id. 500; *U. P. R. R. Co. v. Durant*, 96 U. S. 579; *W. U. T. Co. v. U. P. R. R. Co.*, 3 Fed. Rep. 428; *Burke v. Flood*, 1 id. 548; *Wann v. Kelly*, 5 id. 587; *N. M. L. Ins. Co. v. Elliot*, Id. 229.) Neither modification of contract nor waiver of complete performance can be shown under the general denial. (*Lauitz v. King*, 93 Mo. 513; *Eiseman v. H. Ins. Co.*, 74 Iowa, 11.) The judgment and order appealed from should be affirmed, with costs and ten per cent damages for delay. (*Cohen v. Mayor, etc.*, 128 N. Y. 594.)

O'BRIEN, J. This action was originally brought by the plaintiff's husband, who having died after the first trial, his widow, the present party plaintiff upon the record, was substituted in his place. On the first trial there was a verdict for the defendant, but the judgment was reversed by the Second Division of this court (127 N. Y. 370). On the second trial the court directed a verdict for the plaintiff and the judgment entered thereon has been affirmed at the General Term. In the disposition of this appeal it is only necessary to examine certain exceptions taken by the defendant at the trial to the exclusion of evidence. The cause of action stated in the complaint is that some time in the month of June, 1866, the defendant, as trustee for the plaintiff, received the sum of \$5,000 in cash,

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which he has ever since continued to hold in trust for the plaintiff. That by the terms of the trust, under which the money was received, it was expressly provided, and the money was received upon the condition, that the trust might be terminated by the plaintiff at his election, on or after July 10, 1866. That in February, 1886, the plaintiff notified the defendant of his election to terminate the trust and demanded payment to him of the money, but the defendant neglected and refused to pay the same. The only defense interposed was a general denial. At the trial the plaintiff, in order to prove the allegations of his complaint, gave in evidence a resolution of the common council of the city of New York, authorizing and directing the street commissioner to make a contract for lighting the streets and public places with coal gas, the contract to be founded upon sealed bids and proposals and to be made with the company giving adequate security, to be approved by the comptroller in the manner provided by law, which shall agree to do the same for the lowest price for each lamp or light per annum, or quantity, when it can be measured according to existing regulations, and affording to such company sufficient time to lay their mains and introduce gas as required by the contract. The resolution also contained some provisions as to the form of the contract and repealed all ordinances or resolutions inconsistent with its provisions. There was attached to this resolution, and offered in evidence with it, a paper of which the following is a copy.

“NEW YORK, *June 14*, 1866.

“Received of R. W. Milbank, five thousand dollars (\$5,000), and also certificate for two hundred and fifty (250) shares of the stock of the People Gas Light Company of the City of New York, number seven (7), the said money and stock to be returned to said Milbank in case the resolution above shall not be passed and take effect before the 10th of July next.

“It being understood and agreed that said Milbank shall have the right at his election, in case said resolution shall pass and take effect before the said 10th of July, to purchase back

the said stock at any time within sixty (60) days from the time said resolution shall take effect, by paying to me fifteen thousand dollars (\$15,000) therefor; and that he shall on his part be bound to purchase the same and pay said fifteen thousand dollars (\$15,000) therefor, within said sixty (60) days, at my election.

“MORGAN JONES.

“I assent to and join in the above understanding and agreement.

“NEW YORK, *June 14th*, 1866.

“R. W. MILBANK.”

The defendant's counsel objected to this evidence upon the ground, among others, that it was incompetent and not within the issues made by the pleadings. The court overruled the objection and the defendant's counsel excepted. The plaintiff then proved by other documentary evidence that this resolution was vetoed by the mayor, and on the 10th day of July, 1866, was passed, notwithstanding the veto, and went into effect on that day. This was all introduced under the defendant's objection and exception, and the plaintiff having given this proof rested. The defendant's counsel moved to strike out this evidence upon the ground, among others, that it did not correspond with the allegations of the complaint, or tend to prove the cause of action alleged, but a different cause of action, and upon the same ground, to dismiss the complaint. These several motions were all denied and the defendant excepted. The defendant then offered to prove that after the veto he had a conversation with the plaintiff, who had signed the contract, in which, in substance, he stated to him that he would have to give back the money, as he could not procure the resolution to be passed within the time, to which the plaintiff, in substance, replied that he would not exact performance at the precise day, and further, that when the resolution was finally passed, the plaintiff called upon the defendant and furnished him with a certified copy of the resolution, and he accepted it as performance. This evidence was objected to by the plaintiff on the ground, among others,

that it was not admissible under the pleading, which objection was sustained by the court and the defendant excepted. The questions involved in the appeal arise upon these exceptions. It will be seen that the cause of action alleged in the complaint was the receipt by the defendant, as trustee for the plaintiff, of a sum of money which, by the terms of the trust, could be recalled by the plaintiff on or after a specified day. That the defendant continued ever since the receipt of the money to hold the same under the trust which the plaintiff elected to terminate nearly twenty years afterward by notice, and thus became entitled to have it paid over to him. The parties doubtless knew to what transaction the pleading referred, but it must be admitted that a stranger could hardly anticipate the evidence given from any statement in the complaint. It was within the power of the court to amend the pleading to conform to the proof, and had it exercised that power it is quite probable that the defendant would not have been surprised. The court, however, admitted the evidence as proof of the facts alleged without any amendment, which was a ruling quite favorable to the plaintiff, and the only question now necessary to consider is the proof offered by the defendant to overthrow what had been *prima facie* established. What the plaintiff proved was an agreement on the part of the defendant to return to the plaintiff a sum of money if the resolution should not pass and take effect *before* a certain day named. He showed that the resolution did not pass before that day, and he had averred that for twenty years afterward the defendant continued to hold the money as his trustee. The defendant was entitled to prove any fact that contradicted the evidence given by the plaintiff in support of his complaint. Under a general denial the defendant may controvert by evidence anything which the plaintiff is bound to prove in the first instance to make out his cause of action, or anything that he is permitted to prove for that purpose under his complaint. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 354; *Wheeler v. Billings*, 38 id. 263; *Schwarz v. Oppold*, 74 id. 307; *Gilman v. Gilman*, 111 id. 265, 270.)

Therefore, the defendant could prove that the resolution had taken effect before July 10, 1866, or on that day, if he also followed the latter fact by proof that the plaintiff extended the time within which the resolution could be passed in order to fulfill the condition upon which the defendant could retain the money as his own, discharged from the trust. In other words, he should have been permitted to show that the trust, under which the plaintiff alleged the defendant held the money for twenty years, had in fact been terminated, not *before* July 10, 1866, but on that day, by the passage of the resolution and the acceptance by the plaintiff of that as a substantial performance of the condition upon which the defendant received the money. If the plaintiff, after the writing was signed and delivered, directed the defendant to retain the money as his own, in case the resolution went into effect on the 10th of July, then he had no cause of action, for his interest in it as the beneficiary of a trust had ceased. The plaintiff was permitted to give evidence in support of the complaint that was not strictly admissible. The defendant then had the right to controvert the facts proven by showing what the actual transaction was. He could show that the transaction as to which the plaintiff gave proof never in fact took place, or that it was a different transaction from the one shown in fact or in legal effect. It was part of the plaintiff's case to show that the defendant all the time held for him a sum of money in trust. The defendant could controvert this by showing that the trust had been satisfied by the passage of the resolution on the 10th of July, and that the parties had agreed that after that date the defendant held the money in his own right and as his own, freed from all the obligations of the trust. So that the ruling was erroneous even upon strict rules of pleading as it precluded the defendant from giving proof necessarily embraced within his general denial. But it was admissible also upon another principle. When a plaintiff is permitted to give proof of a contract or obligation other than the one stated in the complaint, the defendant is entitled to the benefit of any defense which he may have to the cause of action

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established. In such a case the plaintiff has proceeded in disregard of his pleading, and it would be manifestly unjust to deprive the defendant of the benefit of any legitimate defense that he may be able to prove in answer to the actual case made by the plaintiff. In this court, in such a case, the pleadings may be regarded as amended to conform to the plaintiff's proof on the one hand and to cover any proof that the defendant may offer which answers or defeats the case made against him on the other. (*Arnold v. Angell*, 62 N. Y. 512.) The evidence offered and excluded was not, of course, conclusive, but it tended to controvert the case made by the plaintiff, and its force and effect was a matter for the consideration of the jury. A cause of action proved but not pleaded may be met at the trial by proof that it was satisfied, extended or modified in such a way as to defeat any right of action upon it, and this was what the defendant attempted to show, and any proof was admissible that tended to show that the plaintiff had in fact no claim. Having denied all the allegations of the complaint, including the trust, he might show that the money came to his hands as compensation for services.

The defendant also offered to show that the transaction was for the purpose of influencing legislation before the common council with respect to the subject embraced in the resolution, and for that reason was contrary to public policy. (*Chesebrough v. Conover*, 140 N. Y. 382.) This offer was excluded on the ground that no such defense had been pleaded, and this ruling is sustained by the decision in the case when before the Second Division on the former appeal. We will not now inquire whether this view is strictly correct or not, as we are disposed to regard the decision as the law of this case at least.

For the reason stated the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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THE ROUND LAKE ASSOCIATION, Respondent, v. BRADFORD D.
KELLOGG, Appellant.

Plaintiff, a corporation incorporated for camp meeting and religious purposes, and owning lands for those purposes, adopted a constitution which gave to its trustees the general oversight of all the business of the association and provided for the election by them of an executive committee, which should have power to act for them during the interim of their regular meetings, and also have general oversight of all the interests of the camp meeting, and should arrange the prices for ground rents and other privileges. Plaintiff leased two lots upon the grounds of said corporation; each lease was for the term of ninety-nine years, and contained conditions to the effect that it was "subject to all the rules and regulations which may from time to time be adopted and promulgated" by plaintiff for the government of its grounds, which were declared to be a part of the lease as if incorporated therein. These leases were assigned to plaintiff, who erected a store on the demised premises. Plaintiff's executive committee thereafter adopted certain rules and regulations, copies of which were posted in public places, distributed among the cottages on the grounds and received general recognition by the association, providing, among other things, that goods or merchandise should not be sold on any of the lots leased by the association without a license or permission being first obtained from its officers. Said executive committee gave to defendant a permit to conduct a store on his lots for the term of five years upon payment of a sum specified annually; after the first year defendant refused to pay the specified sum, and continued to sell goods although notified by plaintiff's superintendent to desist from so doing without a license. In an action to restrain defendant from selling any goods on the lots without having first obtained a license, *held*, that the executive committee had power to enact said rules and regulations; that a finding that they were reasonable and proper was justified; that the conditions in the leases were valid as between the parties and were binding upon defendant as assignee; that plaintiff was entitled to the aid of a court of equity to compel defendant to observe said conditions; and so, that a judgment restraining him from selling any goods or merchandise upon the lots without first obtaining a license was proper.

(Argued January 30, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon

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an order made September 14, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are set forth in the opinion.

C. H. Sturges for appellant. The complaint should have been dismissed upon appellant's motion at the opening of the case on the ground that it failed to state facts sufficient to constitute a cause of action. (*Purdy v. Coar*, 109 N. Y. 448; *Driscoll v. W. B. C. M. Co.*, 59 id. 96, 102; *Bank of Attica v. M. & T. Bank*, 20 id. 501; *Kent v. Q. M. Co.*, 78 id. 159; *Reed v. T. T. M. Co.*, 39 Ga. 98; *Trustees Free School v. Flint*, 13 Metc. 539; *People v. M. Society*, 24 Barb. 570.) The rule or regulation set forth in the complaint was not legally adopted by plaintiff, and no so-called rule or regulation restricting the conduct of business upon defendant's lot or exacting a fee therefor, of which proof was given upon the trial, was ever legally adopted or became valid. (*Taylor v. Griswold*, 14 N. J. Law, 222, 250; 1 Bouvier's Inst. 79; *Thompson v. Schermerhorn*, 6 N. Y. 92; *In re E. I. S. Bank*, 75 id. 388, 393; *Birdsall v. Clark*, 73 id. 73.) Neither the so-called rule or regulation set forth in the complaint, nor any of the similar rules or regulations of which proof has been given, was authorized by the provisions of plaintiff's charter, or the general provisions of the Revised Statutes. Each and all were invalid. (*People v. M. Society*, 24 Barb. 570; *Kent v. Q. M. Co.*, 78 N. Y. 159, 182.) This so-called rule or regulation is not consistent with the Constitution or law of the land, and, therefore, is void. (*Fick Wo v. Hopkins*, 118 U. S. 356; *Sharpless v. Mayor, etc.*, 21 Penn. St. 147; *In re Jacobs*, 98 N. Y. 98.) The power of plaintiff has been used as a snare, and equity will not aid it against this appellant. (*Whitney v. U. F. Co.*, 11 Gray, 359.) The by-law, or so-called rule or regulation set forth in the complaint, and each of the similar rules or regulations of which proof has been given, violated plaintiff's contract with the

defendant. (*Alexander v. Caldwell*, 83 N. Y. 480; *Kent v. Q. M. Co.*, 78 id. 159; *People v. Rosenberg*, 138 id. 410; *Kennebec P. R. R. Co. v. Kendal*, 31 Maine, 470, 477; *Driscoll v. W. B. C. M. Co.*, 59 N. Y. 105; *People v. O'Brien*, 111 id. 1; *Mayor, etc., v. T. A. R. R. Co.*, 33 id. 42.) The court erred particularly in refusing to find the contents of the leases on the east side on the ground that they were "not competent or material," for it had received the evidence of such contents. (*Flora v. Carbeau*, 38 N. Y. 111.) By the decree of the Special Term the defendant has been unlawfully deprived of the use of his property. (*Huckenstine's Appeal*, 70 Penn. St. 102.)

E. Countryman and *Charles S. Lester* for respondent. The defendant holds his property as a member of the Round Lake Association, primarily for the purposes for which that association was incorporated, and subject to all the rules and regulations of the corporate body. (*Post v. W. S. R. Co.*, 123 N. Y. 580; *Bowen v. Beck*, 94 id. 86; *A. D. Co. v. Leavitt*, 54 id. 35; Laws of 1868, chap. 617, § 3.) The association could not, if it would, at least without the consent of all concerned, abandon the corporate purpose or renounce the dedication it has made of the grounds to religious uses. The lessees have acquired rights to have the corporate purpose fulfilled, which cannot be rejected or ignored. And these rights rest as well upon the principle of dedication as of express covenant. (*Hunter v. Sandy Hill*, 6 Hill, 407; *Dezell v. Odell*, 3 id. 215; *Child v. Chappell*, 9 N. Y. 256; *Story v. E. R. Co.*, 90 id. 157; *Johnson v. S. I. C. M. Assn.*, 122 id. 330; *Watertown v. Coven*, 4 Paige, 510.) The defendant having become a member of the corporation, and having definitely agreed to accept his title to the possession of his property, subject to any and all corporate rules and regulations which had been then or might thereafter be adopted in furtherance of corporate purposes and interests, either relating to that particular property or for the general government of the grounds, it follows as such lessee and occupant and mem-

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ber, he is amenable to all the reasonable rules and regulations of the corporate body. (*Flint v. Pierce*, 99 Mass. 68, 70; *Perrine Case*, 7 Watts & Serg. 348; *Cummings v. Webster*, 43 Maine, 192; *Pressler Case*, 17 La. Ann. 127; *Morton Case*, 25 Mo. 393; *Steward v. Winters*, 4 Sandf. Ch. 588, 590; *Howard v. Ellis*, 4 Sandf. 369; *Dodge v. Lambert*, 2 Bcsw. 570; *Ambler v. Skinner*, 7 Robt. 561; *De Forest v. Byrne*, 1 Hilt. 343; *Moore v. Pitts*, 53 N. Y. 85, 86.) The rules and regulations made by the trustees and executive committee, from time to time, subsequent to September, 1868, and March, 1869, when the original constitution and by-laws were adopted, are valid and effectual as the acts of the corporation, and binding upon all its members. (*Hoyt v. Thompson*, 19 N. Y. 207; *S. E. L. Co. v. C. N. Bank*, 127 id. 517; *Martins v. C., etc., Ins. Co.*, 15 J. & S. 520, 521; *Smith v. Nelson*, 18 Vt. 512; *U., etc., Ins. Co. v. Keyser*, 32 N. H. 313, 315; *B. E. S. R. Co. v. B. S. L. R. Co.*, 111 N. Y. 132, 140.) It was urged below that the imposition of a license fee for the privilege of doing business on the grounds was an open violation of defendant's contract rights under the lease. This contention is based upon two obvious errors, one of which is a palpable perversion of fact and the other an equally plain misapprehension or misapplication of law. (*Mayor, etc., v. B. R. R. Co.*, 97 N. Y. 275; *Chautauqua v. Alling*, 46 Hun, 581.) The objection was also interposed on behalf of the defendant that the rules and regulations were unreasonable and inconsistent with the constitution and the laws. This is untenable. (*Chautauqua v. Alling*, 46 Hun, 582; *Matthews v. Associated Press*, 136 N. Y. 323; *People v. Arensberg*, 105 id. 123; *People v. West*, 106 id. 293; *People v. King*, 110 id. 418; *People v. Budd*, 117 id. 1, 8, 14; *Lawton v. Steele*, 119 id. 226; *Carthage v. Frederick*, 122 id. 268; *A. D. Co. v. Leavitt*, 54 N. Y. 35; *C. College v. Lynch*, 70 id. 440, 441; *Wheelock v. Noonan*, 108 id. 179; *Herman v. Roberts*, 119 id. 138; *Dexter v. Beard*, 25 N. Y. S. R. 664; 2 High on Inj. § 1153; *Lewis v. Gollner*, 129 N. Y. 227; *Watrous v. Allen*, 57 Mich. 362; *French v. Macale*, 2 Drury & War. 269; *Coles v. Sims*, 5

De G., M. & G. 1; *Barrett v. Blograve*, 5 Ves. 555; *Hardy v. Martin*, 1 Cox, 26; *Fox v. Scord*, 33 Beav. 327.)

BARTLETT, J. This is an appeal from a judgment affirming the judgment of the special term enjoining the defendant from selling or offering for sale any goods, wares or merchandise upon the lots leased by him of the plaintiff, or upon any of its grounds, without first obtaining a license from the plaintiff.

The plaintiff is a corporation organized as "The Round Lake Camp Meeting Association of the Methodist Episcopal Church of the Troy Conference," under chapter 617, Laws 1868. The name of the corporation was changed, by order of the Saratoga County Court, July 8th, 1887, to the Round Lake Association. In Sept., 1868, the trustees adopted a constitution and by-laws, which were, on the 31st day of March, 1869, adopted and approved at a meeting of the stockholders. This constitution declared that the objects of the association were to appoint and hold such camp meetings within the bounds of the Troy conference as they may choose.

It further provided that the trustees should elect out of their number a president, vice-president, treasurer, secretary and a prudential committee of three, who, together, should constitute an executive committee and have full power to act for the board of trustees during the interim of their regular meetings, and hold office until their successors were elected. It also provided in a separate article that the executive committee should have general oversight of all the interests of the camp meeting, and that they should arrange "the prices for tents, ground rents, fees for entrance for teams, railroad fares, privileges for boarding tents and other privileges."

The trial court finds the constitution was legally revised in 1874, but not changed in the particulars material to this action. On the 26th of March, 1887, certain rules and regulations were adopted by plaintiff's executive committee and posted in public places and distributed among the cottagers, which contained, among others, the following:

"1. Merchandise, general or special, shall not be sold or offered for sale on any lot, or on any place on the association grounds, either on the east or west side of the railroads, without a purchased permit given in writing by the executive committee. * * *

"4. No peddler, organ grinder, tramp, or other person with goods or wares of any kind to sell, shall be allowed to ply his vocation on the grounds."

On May 3rd, 1890, the executive committee also adopted the following additional rules and regulations :

"No person shall sell or offer to sell goods, wares or merchandise upon any of the lots leased by this association, or upon the grounds of the association, without having first obtained a license or permission therefor from the officers of this association.

"No person shall carry on any trade, business or vocation on such lots, or upon the grounds of the association, without first having obtained a license or permission from the officers of this association, or without having first paid the rent or fee fixed by the officers therefor."

May 5th, 1890, defendant was notified, in writing, by plaintiff's superintendent, that the selling of merchandise on his lot was in violation of the rules and regulations, and that he was required to desist and refrain from doing so without the written permission of the executive committee. The defendant then informed the superintendent that he proposed to fight it out, and know what he could do, and would continue to sell as long as he could. On the 24th of May, 1890, copies of the rules adopted on the 3rd of May, 1890, with a notice of their adoption, and that defendant was required to obey the same, were served personally on the defendant. This action was commenced May 26th, 1890.

The plaintiff, in the year 1884, leased to Caroline J. Bancroft lot No. 1426, and to Rice Hall lot No. 1427, and in September, 1886, both of said leases were assigned to the defendant.

These leases contained the following provisions, viz. : " This lease is granted by said party of the first part and accepted by said party of the second part, subject to the following express conditions, reservations and restrictions : * * *

" 5th. This lease is accepted by the said party of the second part, subject to all the rules and regulations which may from time to time be adopted and promulgated by the party of the first part for the government of said grounds, and which are hereby made a part of this lease, as fully to all intents and purposes as if they were incorporated therein.

" 6th. A refusal on the part of the party of the second part, his heirs, legal representatives or assigns, to fulfill all or either of the foregoing covenants, conditions and agreements, shall operate as a forfeiture of this lease, and said party of the first part may, at its option, after such failure or refusal, re-enter upon said premises without suit or legal process, and re-possess, hold and enjoy the same, as of its first and former estate. To all of which terms, covenants and conditions the parties hereto mutually consent and agree."

On the 26th day of March, 1887, the executive committee gave permission to the defendant to conduct a store on the lots covered by these leases, for the sale of groceries, dry goods, etc., on the payment of \$50 for the year 1887, and for the next four years at the rate of not exceeding \$100 per year.

Before erecting his store the defendant was informed that he would have to pay for the privilege of doing business. The defendant, with the exception possibly of the first payment of \$50, refused to pay for the privilege of doing business, and continued to sell his merchandise in violation of the rules and regulations of the association.

The questions presented on this appeal are whether the defendant, as assignee of said leases, is bound by the rules and regulations of the association, and whether the rules and regulations adopted by the executive committee are, in contemplation of law, the rules and regulations of the association.

The learned counsel for the defendant, in view of the fact that the lease is for a term of ninety-nine years, and renew-

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able for a like term of years forever, insists that such a lease is in law a fee simple running as it does to the heir and not the legal representative.

It is not important to determine, for the purposes of this case, whether the defendant took a fee or something less than a freehold estate.

This court has held that where a grantee binds himself by a covenant in his deed limiting the use of the land purchased in a particular manner so as not to interfere with the trade or business of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor taking title with notice of the restriction. (*Hodge v. Sloan*, 107 N. Y. 244.) In the case cited the grantor was a dealer in sand and the grantee covenanted in the deed that he would not sell any sand off the premises conveyed.

The grantee subsequently made a deed containing no such covenant, but his grantee took with notice, and was held to be bound by the original covenant.

Judge DANFORTH said (p. 249): "We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way, and in order to do this it was necessary that he should preclude himself from so using it as that by its means he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business."

This same principle had been previously recognized by this court in *Tallmadge v. East River Bank* (26 N. Y. 105) and *Trustees v. Lynch* (70 id. 440). Also by the High Court of Chancery in England in *Tulk v. Moxhay* (1 Hall & Twells, 105). This court has recently approved the earlier cases in *Rowland v. Miller* (139 N. Y. 93). It is quite clear the

plaintiff was entitled, in executing either a deed or lease, to insist upon such covenants as to the use of lots sold or rented as would protect it in the management of its property in such manner as would be consistent with the objects of its incorporation. The acceptance of the lease even without becoming a party to it was sufficient to render the lessee and his assignee subject to its terms and provisions as if they had signed it. (*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Bowen v. Beck*, 94 id. 86; *Post v. West Shore R. R. Co.*, 123 id. 580.)

It is equally clear that the defendant on accepting the assignment of the leases became *ipso facto* a member of the association and was bound by such rules and regulations as were afterwards adopted and promulgated.

The rules and regulations adopted by the executive committee were found by the trial court to be reasonable and proper, and, in view of the objects for which plaintiff was incorporated, we are of opinion this finding was authorized.

The grounds of the association were dedicated, primarily, to the purpose of holding camp meetings, which were originally held in tents, but afterwards a large permanent auditorium was erected; buildings were also put up for summer schools and Sunday school assemblies. These exercises, religious and educational, continue during the summer for about eight weeks, and from ten to twenty thousand people assemble on such occasions. The grounds were divided into lots to enable persons habitually attending the camp meetings to erect cottages.

As the principal and primary use of the grounds of the association was for religious purposes, it is manifest that the plaintiff must necessarily maintain the strictest supervision of its property. The regulation of the vending of goods in a store or from house to house falls within the limits of this reasonable power.

This brings us to the remaining question in the case, whether the adoption of the rules and regulations by the executive committee is regular and binds the association and its members.

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This depends upon the construction of the constitution adopted by the association in 1869, already referred to, and the powers of the executive committee thereunder.

By this constitution (article IV) the trustees were given the general oversight of all the interests of the association, and the executive committee was clothed with full power to act for the trustees during the interim of their regular meetings. The executive committee by article VI also have general oversight of all the interests of the camp meeting, and among other things arrange ground rents and other privileges.

These powers conferred upon the executive committee were ample to enable it to enact the said rules and regulations, which were posted in public places, distributed among the cottages, and received general recognition by the association.

We are of opinion that the executive committee were given sufficient power by article VI of the constitution to enact rules and regulations, without regard to its authority to act for the trustees when they were not in session, under article IV.

The power to arrange ground rents and other privileges fully authorized the enactment of the rules and regulations to which we have already referred. It is also established by the evidence that these rules and regulations were recognized and acted upon by the trustees and members of the plaintiff in a manner that amounted to legal ratification and confirmation. The state of facts disclosed by this record clearly entitled the plaintiff corporation to the aid of a court of equity in compelling the defendant to observe the covenants and conditions by which he was bound as assignee of the leases in question. We have examined the various exceptions in the case and find no error that should lead to the reversal of the judgment.

The judgment is affirmed, with costs.

All concur.

Judgment affirmed.

LEWIS C. KING, Respondent, v. JOHN TOWNSEND, Impleaded,
etc., Appellant.

Equity may interfere to prevent a threatened cloud on title where there appears to be a determination to create such a cloud, and the danger is not merely speculative or potential.

In an action to compel the cancellation of a lease, executed and delivered by the comptroller of the city of New York, upon a sale of land for unpaid taxes, it was conceded that the lease was void because the sale included an illegal charge for interest; but it was claimed by defendant, the lessee, that the lease constituted no cloud on plaintiff's title, as it was ineffective to give a right of possession or establish a title, because no notice to redeem had been given the occupant or owner, and a comptroller's certificate obtained, as required by the statute (§§ 18-16, chap. 381, Laws of 1871), before the lease could be recorded. *Held*, that while, until the certificate was given, no title passed by the lease, and so, it might not constitute an actual cloud, yet it was a decisive step towards it, and a threat and menace to create one in the future, and as the invalidity of the lease did not appear upon its face, the court had jurisdiction to grant the relief sought.

Also *held*, that the fact the lessee had for many years omitted to give the notice was no answer, but, on the contrary, it only intensified the injury and danger.

Clark v. Dacenport (95 N. Y. 478), distinguished.

In the plaintiff's chain of title was a deed to three persons, who were described as trustees of a land association. It did not appear that the association was incorporated, or capable as such of taking a legal title. *Held*, it was to be assumed that the association was a partnership of individuals, of which the grantees were members, holding the legal title for the benefit of themselves and others, and so they were not mere trustees, holding simply a nominal title, and the provisions of the Revised Statutes (1 R. S. 728, §§ 49-58), taking away such a title and vesting it in the beneficiary, did not apply; and, therefore, whether the deed was to be regarded as one to the grantees named individually, or as a conveyance for their benefit and that of others, they had authority to sell and convey a good title.

At the time of the conveyance to plaintiff defendant T., the lessee, was in possession. He showed no title upon which his possession rested, except the lease. *Held*, that his possession thereunder was not adverse to plaintiff's title, and so did not affect the validity of his deed.

In a prior action of ejectment brought by one then holding the record title against T., while he was in possession, a judgment was rendered in his favor. In that action the plaintiff proved no possession, either in himself or any of his grantees, and the defendant neither pleaded nor

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proved a title, but relied on his possession. *Held*, that the judgment was not conclusive against the title now held by plaintiff, as it did not establish a title in any one, and did not destroy or affect a title subsequently made perfect by possession.

Reported below, 65 Hun, 567.

(Argued February 9, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of June, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Townshend for appellant. There was no cloud on the title. (Laws of 1871, chap. 381; *Smith v. Buhler*, 121 N. Y. 213; *Lockwood v. Gehlert*, 127 id. 244; *Bowns v. May*, 120 id. 362; *Purcell v. Elliott*, 6 Pet. 95; *Hyatt v. Seeley*, 11 N. Y. 58.) Plaintiff's suit was premature. (*Guest v. City of Brooklyn*, 69 N. Y. 512; *Clark v. Davenport*, 92 id. 483.) Plaintiff mistook his remedy. (*In re Willis*, 30 Hun, 13; Laws of 1871, chap. 381, § 15; Laws of 1882, chap. 410, § 951; *U. S. T. Co. v. Grant*, 137 N. Y. 12; *Stewart v. Chrysler*, 100 id. 378; *People v. Cady*, 99 id. 620; *Clark v. Mayor, etc.*, 111 id. 621; Code Civ. Pro. §§ 1525, 1638.) Plaintiff did not show any title. (*Moores v. Townshend*, 102 N. Y. 391; *Bates v. L. M. Co.*, 130 id. 204; Penal Code, §§ 129, 130.) The findings of fact and law in the case of *Moores v. Townshend* were in evidence; they estopped plaintiff from proving any fact contradictory of such findings. Without contradicting those findings plaintiff could not recover. The rejection of such findings was reversible error. It took from appellant his main defense. (*Smith v. Smith*, 79 N. Y. 634; *Beebe v. Elliott*, 4 Barb. 457; *Young v. Rummell*, 2 Hill, 480, 481; *Dunkle v. Wiles*, 6 Barb. 429; *Gardner v. Buckbee*, 3 Cow. 120; *Moore v. E. R. R. Co.*, 128 N. Y. 671; *C. C. P. & M. Co. v. Walker*, 114 id. 12;

Dunham v. Bower, 77 id. 80; *Smith v. Smith*, 79 id. 634; *Stannard v. Hubbell*, 123 id. 531; *Ashton v. Rochester*, 133 id. 197; *Bohn v. Hatch*, Id. 64; *Dawley v. Brown*, 79 id. 398; *Briggs v. Wells*, 12 Barb. 567; *Neftz v. Pitts*, 74 Penn. St. 343; *Barger v. Hobbs*, 67 Ill. 592; *Sherman v. Dilley*, 3 Nev. 21; *Masten v. Olcott*, 24 Hun, 587.) The judgment in *Moore v. Townshend* was conclusive as to the title litigated in that action. (Code Civ. Pro. §§ 1209, 1524, 1525; *Stowell v. Chamberlain*, 60 N. Y. 277; *Roberts v. Baumgarten*, 126 id. 339; *Wing v. De La Rionda*, 131 id. 431; *Unglish v. Marvin*, 128 id. 386; *C. Bank v. G. F. Church*, 127 id. 365; *Messenger v. F. N. Bank*, 6 Daly, 190; *Subariego v. Maverick*, 124 U. S. 297; *Tuska v. O'Brien*, 68 N. Y. 449; *Evans v. Millard*, 16 id. 619; *Lewis v. Pier Co.*, 125 id. 348.

L. A. Gould for respondent. The alleged lease in controversy is wholly void, and a court of equity will remove it as a cloud upon plaintiff's title. (*In re Willis*, 30 Hun, 13; *Thompson v. Burhans*, 61 N. Y. 65; *Ward v. Dewey*, 16 id. 522; *Crook v. Andrews*, 40 id. 549; *Scott v. Onderdonk*, 14 id. 15, 16.) The judgment of dismissal in the ejectment suit is not an estoppel as against respondent. (*Sweet v. Tuttle*, 14 N. Y. 465; *Rose v. Hawley*, 133 id. 315; *Russell v. Place*, 94 U. S. 606; *Bell v. Winfield*, 109 N. Y. 202; *Lewis v. O. N. Co.*, 125 id. 341; Bigelow on Estoppel, 61; *Cromwell v. Sac Co.*, 94 U. S. 351.) Plaintiff proved a complete record title and actual possession thereunder. (*Sinclair v. Jackson*, 8 Cow. 543.) The legal title was never vested in the New York City Land Association, No. 1. (*Tonar v. Hale*, 46 Barb. 361; *Bradstreet v. Clarke*, 12 Wend. 603; *Jackson v. Corey*, 8 Johns. 385.) The deed to plaintiff is not void for champerty. (*Dawley v. Brown*, 79 N. Y. 390; *Bedell v. Shaw*, 59 id. 49; *Bensel v. Gray*, 62 id. 623.)

FINCH, J. The relief sought in this action is the cancellation of a lease executed and delivered by the comptroller of

the city of New York upon a sale for unpaid taxes. It is admitted by the defendant, who is the assignee of the lease, that it is void because the sale included an illegal charge for interest. It would seem that such an admission should at once end the controversy and the lease be promptly cancelled, but some ulterior purpose appears to lie behind the apparent litigation, and serves to prolong it. For, notwithstanding the defendant's concession, he resists the relief sought upon the double ground that there is no cloud on the one hand and no title to be clouded on the other.

The claim that the lease constitutes no cloud is founded upon the provisions of the statute which make the lease inchoate; ineffective to produce a right of possession or establish a title; until a specified notice to redeem has been given to occupant or owner, and a certificate of which, signed by the comptroller, must accompany the record of the lease. (Laws of 1871, ch. 381, §§ 13, 14, 15 and 16.) It is undoubtedly true that, until that certificate is given, the right of the lessee is imperfect and no title passes by the conveyance. (*Lockwood v. Gehlert*, 127 N. Y. 241.) But if we concede that the imperfect and inoperative lease does not constitute an actual cloud it is nevertheless a decisive step towards the creation of a cloud and a threat and menace to create one in the future. Equity may interfere to prevent a threatened cloud as well as to remove an existing one. (*Sanders v. Yonkers*, 63 N. Y. 492.) It is true that, in such a case, there must appear to be a determination to create a cloud, and the danger must be more than merely speculative or potential. That was said of tax proceedings in which no lease had been given and there was no proof that the purchaser claimed it or the city threatened it. Here it has been given. Its very existence is a threat. It was not given for amusement or as an idle ceremony. It meant and could only mean a purpose to subvert the title and possession of the owner. The further steps necessary to make the result effective lay wholly in the option of the lessee. If he actually served the necessary notice and filed the prescribed affidavit and satisfied the comp-

troller of those facts the certificate followed as a matter of course if not barred by a redemption. The lessee, therefore, in the present case stands with an effective weapon in his hands and may strike his blow when he pleases. It is in that respect that the situation differs from that in *Clark v. Davenport* (95 N. Y. 478). There the state comptroller had not given a deed and was not bound to give it. He might instead cancel the sale and could be compelled to do so. Here the city comptroller has given the lease and has no discretion left. If the grantee gives the notice and proves it, the comptroller must make the certificate. Nor is it an answer to say that for many years the lessee has omitted to give the notice. That only intensifies the injury and the danger. In *Hodges v. Griggs* (21 Verm. 280) a creditor's execution against land following an attachment had been allowed to sleep for seven or eight years, and equity required him to enforce his right or remove the threatened cloud. And so the defendant here has no right to maintain a threat of title as lessee, when he confesses that it is founded on no legal right. The lease is something more than a certificate of sale. It is in form and terms a conveyance, effective at the option of the lessee if there be no redemption. The statute provides that "all such leases executed by the said comptroller and witnessed by the clerk of arrears, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements for taxes or assessments, or Croton water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute." Such a lease, armed with such presumptions, effective at the option of the lessee, unless there is a redemption for his benefit drawing forty-two per cent of interest, and sufficient to prevent any sale of the property and cloud the owner's right, cannot be said to be a mere speculative danger.

Nor is it true that the invalidity of the lease appears upon its face. It shows no details of the amounts for which the sale was made, and the presumptions attending it make proof

of such details unessential to the right of the lessee. It is only by evidence outside of the lease itself that its invalidity can be made to appear.

I think, therefore, that enough was shown to justify the intervention of equity to cancel the lease even if considered only as a threat to create a cloud, and if the action be regarded as one not to remove but to prevent a cloud.

The further controversy appears to me to be quite extraordinary. It is over the purely legal question whether the plaintiff's title was or was not good and perfect, and the equity action became busy with the exact issue belonging to an action of ejectment. The plaintiff alleged that he was the owner of the land as he was bound to allege, and the defendant denied the allegation. If thereupon the plaintiff, as a condition of equitable relief, is compelled, not only to show possession which raises a presumption of title, but to go beyond that and disclose and defend the actual title under which he holds, with the burden of establishing it resting on him, and every weakness in it inuring to the adversary, and the final judgment conclusive on the question, he is stripped of every advantage due to his possession and which would be his in an action of ejectment. I incline to the opinion that this plaintiff was not bound to show or defend his paper title; that he might safely have rested upon his possession and the presumption of ownership which the law attaches to it, and was not required to subject his chain of title to the attack of his adversary. But I do not decide that question, or bind my own later judgment, because in this case no such objection appears; the paper title was disclosed and fought over and passed upon, without objection or protest; and so the question is presented whether it is good or not.

The plaintiff's chain of title was attacked, first, at the conveyance by Rollins to Mooney, Stansbury and Queripel, described as trustees of the New York City Land Association, but, nevertheless, running to them "as joint tenants, to the survivor of them, his heirs and assigns forever." It does not appear that the association was a corporate body or capable as

such of taking a legal title. It must be assumed to have been a partnership of individuals associated for dealing in real estate. Who they were we do not know, but we must presume that the three grantees were members of the association holding the legal title for the benefit of others as well as of themselves. They had, therefore, or may have had, a beneficial interest, and were not mere trustees holding the bare and naked legal title. The sections of the Revised Statutes which take away the nominal title and vest it in the beneficiary intended do not apply to a case where the grantee has himself a beneficial interest in the grant and is something more than the holder of the mere nominal title. (1 R. S. p. 728, §§ 49-58; *N. Y. Dry Dock Co. v. Stillman*, 30 N. Y. 194.) No case was made sufficient to divest the grantees of the legal title and vest it in an association which probably could not take at all; and whether we regard the deed as one to the individuals merely, discarding the reference to the association as matter of description (*Towar v. Hale*, 46 Barb. 361), or as conveying to some extent also for the benefit of others, the result is the same; for in the latter case there was undoubted authority to sell, entirely consistent with the possible or supposed trust, and in no respect a contravention of its purposes; so that the purchaser's title would be good, and not charged with responsibility for the due disposition of the proceeds.

Nor was the deed to plaintiff void because at its date Townshend was in possession and holding adversely. If he held under the comptroller's lease his possession was not adverse to plaintiff's title. (*Moores v. Townshend*, 22 J. & S. 249; *Bedell v. Shaw*, 59 N. Y. 46.) If he did not hold under that he failed to show any specific title upon which his possession rested. (*Dawley v. Brown*, 79 N. Y. 396.) He now asserts that he held under the judgment in ejectment rendered in *Moores v. Townshend*, but that judgment gave him no title, and adjudged none in him. He pleaded none and defended on his possession alone.

But he further relies upon the decision in that action as conclusive against the title now asserted by the plaintiff.

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Judgment then went for the defendant and is described as upon the merits. It settled that Moores at that time and upon the then existing facts had no valid title, such as to defeat Townshend's possession. The judgment established no title in anybody, for the defendant neither pleaded nor proved one in himself, but stood, as he had a right to stand, on his possession. The certificate of the Superior Court shows that the plaintiff proved no possession either in himself or in any of his grantors, and he may have been defeated for that reason and that alone. But the present plaintiff has obtained possession and changed the situation. The previous adjudication that a title in the air was bad, does not destroy the title subsequently anchored to the possession. The conditions are different; the questions are not the same. The argument of the General Term shows, I think very fairly, that the judgment in ejectment is conclusive only as to the title established in that action, and that the judgment rendered did not establish any. The defendant pleaded none; the plaintiff proved none. If the court had decided in that case that the paper title disclosed was at any point defective or unsound, the decision would conclude us, but it does not so appear. The court may have held it to be good in and of itself provided only that there was possession somewhere under it. There is such possession now, and a decision on the present facts in favor of the plaintiff does not necessarily contradict the previous judgment against his grantor. At all events, the defendant was bound to show a decision adverse to and destructive of the title now asserted in some of its essential elements, but has not done so. In that respect we agree with the reasoning of the General Term.

It follows that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

LEVI P. ROSE, Appellant, v. DAVID HAWLEY et al., Respondents.

Where a party has been defeated in his action by reason of neglect to perform some preliminary act necessary to perfect the cause of action, such as giving a notice, the judgment is not a bar to another action begun after the performance of the requisite preliminary act.

Where a grantor of land seeks to re-enter because of a breach of a condition subsequent, he must show that the true spirit and purpose of the condition have been willfully disregarded by the grantee; it is not sufficient to prove a technical breach, through the action of strangers, without the grantee's permission.

In 1848 plaintiff conveyed certain lands to the town of Yonkers, whose rights have since become vested in defendant, the city of Yonkers. The deed contained a condition that the land conveyed should forever remain public and open as a public highway, and that no house, or other erection, save a public monument, should ever be built, erected or permitted thereon. In 1857 the line of the land was located by competent engineers, and defendant H., who owned adjoining lands, erected a building coming up to said line; this was recognized as the true line by the city. H. also constructed an area under the surface of the ground in front of said building, about four feet wide, with a stairway leading down from the street; over this area is a sidewalk with gratings and a door to the stairway, which, when closed, constitute no obstruction. In an action of ejectment to recover possession of the land conveyed, based on the ground of forfeiture of title because of alleged breach of said condition, it was found, upon conflicting evidence, that the building, which was sixty-three feet in length, encroached at one end sixteen inches, and at the other, two inches upon the land conveyed. Plaintiff saw the building erected, and for more than twenty years made no claim of a breach of said condition. *Held*, that, under the circumstances shown, it did not appear that the city had done, or knowingly permitted anything which amounted to a breach of the condition within any fair and reasonable construction of the condition, or the intention of the parties to the deed when it was executed; also, that no permission to erect the building, such as was contemplated by the parties to the contract, was shown.

In a former action brought by plaintiff to recover the land granted, a judgment was rendered in his favor; this was reversed by the General Term, and a new trial granted on the law and facts. The order of the General Term was affirmed on appeal to this court, and judgment absolute ordered against plaintiff upon his stipulation on the ground, among others, that no notice had been given to the city of the erection claimed as a breach of the condition. *Held*, that the former judgment was not a bar.

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Statement of case.

As to whether plaintiff is bound absolutely by the former judgment because of this stipulation, even in a new action, brought upon new or additional facts subsequently occurring, *quære*.

(Argued January 22, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 11, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

James M. Hunt for appellant. The defense set up in the answer to the effect that plaintiff's cause of action was barred by a former adjudication was not established. (*Marsh v. Masterson*, 101 N. Y. 401; *Spellman v. Terry*, 74 id. 448; *Shaw v. Broadbent*, 129 id. 114; *D. U. S. C. Co. v. D. T. Co.*, 84 id. 156; *Lewis v. O. N. & P. Co.*, 125 id. 341; *Bell v. Merrifield*, 109 id. 202; *Porter v. Smith*, 107 id. 531; Code Civ. Pro. § 1318; *Rose v. Hawley*, 118 id. 502.) The defense of the Statute of Limitations as set up in the answers of the various defendants was not established in any particular. (*Sturges v. Parkhurst*, 18 J. & S. 306; *Rossell v. Wickham*, 36 Barb. 386; *M. E. Church v. Brownell*, 5 Hun, 466; *Wood v. Squires*, 1 id. 481; *Bradt v. Church*, 110 N. Y. 537; *Cagger v. Lansing*, 64 id. 417, 430; *Tyler v. Heidorn*, 46 Barb. 439, 464, 465, 466; 48 N. Y. 671; *Van Rensselaer v. Barringer*, 39 id. 9, 15; *Bedell v. Shaw*, 59 id. 46, 49; *Porter v. McGrath*, 9 J. & S. 104; *Bliss v. Johnson*, 94 N. Y. 235, 242; *Kirk v. Smith*, 9 Wheat. 241, 288; *Jones v. Smith*, 73 N. Y. 205, 211; *Patten v. N. Y. E. R. R. Co.*, 3 Abb. [N. C.] 346; *Miller v. Platt*, 5 Duer, 272; *Pope v. Hanmer*, 74 N. Y. 240; *Yates v. De Bogert*, 56 id. 527, 532; *Flora v. Carbeau*, 38 id. 111; *Abeel v. Von Gelder*, 36 id. 513; *Wiklow v. Lane*, 37 Barb. 247, 249; *Becker v. Van Valkenburgh*, 29 id. 322; *Jackson v. Andrews*, 7 Wend.

157, 158; *C. L. N. Co. v. K. N. Co.*, 37 Hun, 1; 108 N. Y. 631.) The breach of the condition in the deed, as claimed by plaintiff, and as established by the verdict of the jury upon the first trial of this action, is sufficient in law to make plaintiff the absolute owner in fee of the premises covered by that deed. (*Rose v. Hawley*, 118 N. Y. 502, 511; *Jackson v. Allen*, 3 Cow. 220; *Gilbert v. Peteler*, 38 N. Y. 165-168; *Craig v. Wells*, 11 id. 315-320; *Coleman v. Beach*, 97 id. 545; *Plumb v. Tubbs*, 41 id. 442.) The defendants, in their answer, set up an alleged sale prior to the commencement of this action by the sheriff, of all plaintiff's interest in the premises in question. The fact that a right of re-entry upon breach of a condition subsequent contained in a deed, before the grantor has actually obtained possession of the land, and thereby entirely defeated the conditional deed, is neither an estate in land nor any such right that it can be sold, assigned or seized for debt. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *Towle v. Remsen*, 70 id. 303, 312; *Sheridan v. House*, 4 Abb. Ct. App. Dec. 218-226.) It is not necessary for a plaintiff claiming the right of re-entry upon breach of a condition subsequent to make an entry upon the premises in question. (*Plumb v. Tubbs*, 41 N. Y. 442-449; *Tyler v. Heidorn*, 48 id. 671.) The point taken by counsel for the city of Yonkers that there is no proof that the city of Yonkers is in possession of any part of the premises is untenable. (*Strong v. City of Brooklyn*, 68 N. Y. 1.) Under the proof it could not be held as a matter of law that plaintiff had waived his rights. (*Rose v. Hawley*, 118 N. Y. 502; *Gray v. Blanchard*, 8 Pick. 284; *De Lancy v. Ganong*, 9 N. Y. 24; *Tinkham v. E. R. Co.*, 53 Barb. 393; 2 Washb. on Real Prop. [4th ed] 19.) The fact that the United States government rented these premises for its post-office, and that plaintiff was the agent of the government and had charge of the premises so rented, does not affect the plaintiff's rights in this action. (*Child v. Chappel*, 9 N. Y. 246; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 567; *Smith v. Babcock*, 36 N. Y. 167, 168; *Hoag v. Hoag*, 35 id. 469;

Prevot v. Lawrence, 51 id. 219, 222; *Hetzel v. Barber*, 69 id. 1, 15; *Whiting v. Edmunds*, 94 id. 309, 312-314.) The proof of the commencement of the former action by service of the summons and complaint upon the city of Yonkers, that the city defended and the city attorney was present upon the trial, and that upon such trial the court, upon all the proof submitted, found the facts which constitute the encroachment, and that all of these occurrences had taken place prior to the commencement of the present action, was sufficient proof of notice to the city of Yonkers at the time this action was commenced. (133 N. Y. 315-319.)

Theodore Fitch for Hawley and others, respondents. Even if the plaintiff is right in his claim of an encroachment, the encroachment claimed would not constitute a breach of the condition of his deed to the town of Yonkers. (*In re Tilden*, 98 N. Y. 434, 443; *McGriffin v. Cohoes*, 74 id. 387; *Hoffman v. E. Ins. Co.*, 32 id. 412; *Coffin v. Reynolds*, 37 id. 640; *Patten v. N. Y. E. R. R. Co.*, 3 Abb. [N. C.] 313; *Rose v. Hawley*, 118 N. Y. 502.) If, as the defendants understand the fact to be, the General Term has, by its decision and judgment in the first action between the parties to this record, determined that there was no breach of the condition contained in the deed of the plaintiff to the town of Yonkers of December 30, 1848, and no substantial encroachment on the premises, the plaintiff's cause of action based on the alleged breach of condition and the alleged encroachment was thereby extinguished, and when, by affirmance in the Court of Appeals of the order of the General Term, judgment absolute was given against him there was an end of that cause of action. (*Rose v. Hawley*, 133 N. Y. 315; 118 id. 502.) A final adjudication upon essential material facts is conclusive upon the same parties and will bar a subsequent action. (*Jordan v. Van Epps*, 85 N. Y. 427; *Smith v. Smith*, 79 id. 634; *Taska v. O'Brien*, 68 id. 446, 449; *Bloomer v. Sturges*, 58 id. 168, 276; *Clemens v. Clemens*, 37 id. 57, 74; *Daly v. Brown*, 4 id. 71; *Burt v. Stern-*
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bergh, 4 Cow. 559; *Phillips v. Berick*, 16 Johns. 136; *Cromwell v. County of Sac*, 94 U. S. 351; *Aurora City v. West*, 6 Wall. 82; Bigelow on Estoppel [5th ed.], 165; Wells' *Res Adjudicata*, etc., §§ 248, 251; Freeman on Judgments, § 260; *Bell v. Merrifield*, 109 N. Y. 201.) The stipulation given by the plaintiff in taking his appeal from the order of the General Term granting him a new trial in the first action, and the judgment absolute rendered thereon by the Court of Appeals in affirming the order, preclude the plaintiff from again litigating the same cause of action. Such a judgment rests upon the consent of the appellant, and not upon the merits of the controversy, and bars any further litigation of the same cause of action. (*Roberts v. Baumgarten*, 126 N. Y. 336; *Cobb v. Hatfield*, 46 id. 535; *Hiscock v. Harris*, 80 id. 402; *Caswell v. Hazard*, 121 id. 484; *Godfrey v. Moser*, 66 id. 250; *People ex rel. v. Thatcher*, 55 id. 525; *Lanman v. L. R. R. Co.*, 18 id. 493.) If the plaintiff ever had any rights from a breach of the condition they were absolutely barred by the Statute of Limitations. (Code Civ. Pro. §§ 365, 371, 372, 415; *Foster v. H. E. Co.*, 9 Barb. 287; *Bradstreet v. Huntington*, 5 Pet. 402; *Duryea v. Schafer*, 55 N. Y. 446; *Crory v. Goodman*, 22 id. 175; *Driggs v. Phillips*, 103 id. 77.)

Joseph F. Daly for city of Yonkers, respondent. The case on appeal shows that all the issues raised by the pleadings in this action were in a former action adjudicated and judgment absolute rendered against the plaintiff in favor of the defendants. (*Rose v. Hawley*, 133 N. Y. 315.) The fact that judgment absolute was rendered against the plaintiff in favor of the defendants in a former action between the same parties upon the same issues being established, any recovery by the plaintiff in the present action was barred. (*Lanman v. L. R. R. Co.*, 18 N. Y. 493; *Cobb v. Hatfield*, 46 id. 533; *Godfrey v. Moser*, 66 id. 250; *Mackay v. Lewis*, 73 id. 382; *Roberts v. Baumgarten*, 126 id. 326; *Hiscock v. Harris*, 80 id. 402; Code Civ. Pro. § 191.) A final adjudication

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upon essential material facts is conclusive upon the same parties and will bar a subsequent action. (*Lorillard v. Clyde*, 122 N. Y. 41; *Stannard v. Hubbell*, 123 id. 520; *Mursh v. Masterton*, 101 id. 401; *Leavitt v. Wolcott*, 85 id. 212; *Le Guen v. Gouverneur*, 1 Johns. 436; *Clemens v. Clemens*, 37 N. Y. 59; *Maloney v. Horan*, 12 Abb. [N. S.] 293; *Embury v. Connor*, 3 N. Y. 511, 522; *Pray v. Hegeman*, 98 id. 351; *Church v. Kidd*, 88 id. 652; *Dowley v. Brown*, 79 id. 390; *Smith v. Smith*, Id. 634; *Dunham v. Bower*, 77 id. 76.) Notice to the city of the encroachment was an essential portion of the plaintiff's case, and a failure on his part to prove such notice must necessarily result in a dismissal of the complaint. (*Rose v. Hawley*, 118 N. Y. 502; 133 id. 315.) The plaintiff's remedy (if he ever had any) is absolutely barred by the Statute of Limitations, and on this ground alone the complaint was properly dismissed. (*Tyler v. Heidorn*, 46 Barb. 439; *Jackson v. Schoomaker*, 4 Johns. 390, 399; *Jackson v. Cairns*, 20 id. 301, 306; *Grim v. Dyar*, 3 Duer, 359; *Rowan v. Delsey*, 18 Barb. 484, 488; *Randall v. Ruab*, 2 Abb. Pr. 307, 313; *Driggs v. Phillips*, 103 N. Y. 77; *Bliss v. Johnson*, 94 id. 235.) Neither the town, village nor city of Yonkers, nor the authorities of either of them, could by any act or omission of theirs give permission to obstruct the public highway, nor could any omission, or even express act, work a forfeiture of the land in question. (*People v. Kerr*, 27 N. Y. 188; *Milhu v. Sharp*, Id. 611; 2 Dillon on Mun. Corp. 660; *S. V. O. Asylum v. City of Troy*, 76 N. Y. 110.) Where property is held by a city not as proprietor of the land, but only in trust for the use of the inhabitants as a highway, an action for ejectment cannot be maintained. (2 Dillon on Mun. Corp. § 665; *Child v. Chappel*, 9 N. Y. 246; *Strong v. City of Brooklyn*, 68 id. 1; *Cowenhoven v. City of Brooklyn*, 38 Barb. 9.)

O'BRIEN, J. The questions presented by this appeal arise in an action by the plaintiff to recover the possession of real property, based upon allegations of the breach of conditions

subsequent in a deed. On the 30th of December, 1848, the plaintiff conveyed to the municipal corporation then known as the town of Yonkers, a parcel of land described as containing eighty-four-hundredths of an acre. All the interest, rights and obligations conferred by this deed have since become vested in the city of Yonkers, one of the defendants in this action. The deed, after a description of the land intended to be conveyed by metes and bounds, contained the following provision: "This conveyance is upon this express condition, that the strip of land forming part of the premises above described, and being twelve feet and six inches in width, and extending all along said Academy street, shall forever hereafter be and remain a part of said Academy street, and shall never be used for any other purpose whatsoever. And also that all the residue of said land hereby conveyed shall forever hereafter be and remain public and open as a public highway, and that no house, building or other erection whatsoever, except a public monument, shall ever be built or erected or permitted upon the said land or upon any part thereof."

The complaint alleges in terms quite broad and general that there has been a breach of this condition, and particularly that the defendant Hawley has been permitted by the city to erect a building on a part of the premises, and that it still continues to permit him to maintain the building and hold the land upon which it was erected and claim it as his own contrary to the conditions expressed in the grant.

At the trial the plaintiff attempted to show by proof that a building erected by the defendant Hawley or his grantors many years ago encroaches upon the land described in the deed. This building is north of the land conveyed and is something over sixty feet in length. It is claimed that the southerly wall stands upon a portion of the soil included within the bounds of the deed to the town to the extent of sixteen inches at one end of the building and two inches at the other end. The evidence on this point is quite complicated, obscure and conflicting, but it is conceded that unless there is some insurmountable legal obstacle in the way of the

plaintiff's recovery in any event, that he was entitled to have the fact as to the existence and extent of the alleged encroachment determined by the jury. The other proof, in regard to the breach of the condition, shows the existence of an area south of the building above mentioned, under the surface of the ground, extending south from the building four feet, about eight feet deep. The southerly wall of this area is sixty-four feet in length, eight feet in height and about sixteen inches thick. All the surface inclosed in this area is within the bounds of the land conveyed by the deed. There is a stone stairway in the area leading below from the street, and over all the space is a sidewalk containing gratings and a door to the stairway which, when closed, constitutes no obstruction to persons passing upon the walk. This feature of the case simply shows a practice quite common in cities of using the space under the walk as a cellar or area for the storage of goods which, in no material respect, interferes with the use of the surface above as a public highway in the manner in which sidewalks are generally used. This was the situation with respect to the breach of the condition when this litigation began. The persistency of the litigants, and the varying results of the contest from time to time, have added to the case some new complications which require some notice in order to obtain a clearer view of the questions presented now by the record.

In the year 1886 the plaintiff first brought his action to recover the land granted as above described, and in that year he obtained a judgment in his favor upon a trial by the court without a jury. This judgment was reversed by the General Term upon the law and the facts and a new trial granted. (*Rose v. Hawley*, 45 Hun, 592.)

From this result the plaintiff appealed to this court, stipulating, as required by section 191 of the Code, that if the order was affirmed judgment absolute should be rendered against him. The case was heard by the Second Division of this court, which affirmed the order appealed from and directed judgment absolute against the plaintiff.

(*Rose v. Hawley*, 118 N. Y. 502.) This judgment was duly entered upon the remittitur in the court below. One of the reasons given in the opinion of the Second Division for the affirmance of the order was that no notice had been given to the city of the erection claimed as a breach of the conditions in the deed. The plaintiff began this action in the year 1890, and the complaint differs from that in the former action only in this respect. It contains allegations as to the commencement of the first action, the service of the complaint upon the city and the defendant Hawley, charging a breach of the conditions and stating the facts constituting the same, which were substantially identical with the facts contained in the record and already mentioned; that the city appeared and defended the action, and thus had notice of all the facts. The defendants, in addition to the defenses interposed in the first suit, have pleaded the former judgment as a bar. Before serving the answer, however, they demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and upon the further ground that upon its face the existence of the former judgment appeared which constituted a bar to this. The demurrer was sustained at the General and Special Terms, but overruled in this court. We then held that, for the purpose of the question then before us, nothing could be known in regard to the former judgment except what was stated in the complaint, and that enough did not appear to sustain the demurrer. (*Rose v. Hawley*, 133 N. Y. 315.) In the answer the defendants have set forth fully all the facts in regard to the former action, and allege that the final judgment was upon the merits and determined the question of encroachment and breach of the conditions. The trial of the issues was had before a jury and the plaintiff had a verdict, but the judgment was again reversed at the General Term, upon the facts, and a new trial granted. (*Rose v. Hawley*, 69 Hun, 614.) Upon the new trial the same facts appeared, and upon the defendants' motion the court dismissed the complaint upon the merits, to which ruling the plaintiff excepted. The judgment entered in favor of the defendants upon this decis-

ion has been affirmed in the court below, and the record containing all the proceedings is now before us for review. The former adjudication was not upon the merits in the sense which the rule requires in order to render the judgment a bar in another action. The plaintiff failed, so far as this question was involved, because notice of the alleged encroachment could not be imputed to the city. Since the judgment that element of the plaintiff's case has been supplied, and hence the present action may be said to stand upon facts occurring after the first judgment, or at least after the commencement of that action. Where a party has been defeated in his action by reason of neglect to perform some preliminary act necessary to perfect the cause of action, such as the giving of notice or the like, the judgment is not a bar to another action begun after the cause of action has become perfected by the giving of notice or the performance of the requisite preliminary act, whatever it may be. A party who fails in an action upon a note or other promise for the reason that it was not due at the time the suit was commenced, may bring another action when the promise matures, and in such cases the former judgment, though rendered upon the merits, is no bar, and the same principle applies to the facts in this case. A subsequent action may be brought in such cases in a way to avoid the objection which proved fatal in the first. (*Marsh v. Masterton*, 101 N. Y. 401-407; *Spelman v. Terry*, 74 id. 448; *Shaw v. Broadbent*, 129 id. 114; *Bell v. Merrifield*, 109 id. 202.)

But the plaintiff had stipulated in the former action that in case his appeal to this court was unsuccessful then judgment absolute might be rendered against him, and such judgment was rendered. The plaintiff, by this stipulation, waived his statutory right to another trial, which is given by the Code in actions for the recovery of real property (*Roberts v. Baumgarten*, 126 N. Y. 336), and whether he is bound by the former judgment absolutely and forever, even in a new action, brought upon new or additional facts, not existing when the former suit was commenced, may, perhaps, be still an open question, which, in

the view we are disposed to take of the case, is not now important to decide.

It is quite certain that the plaintiff cannot recover without showing a breach of the condition in some substantial and material respect. The important question, therefore, is whether such a breach was shown by the facts, assuming, as we must, that the jury would have found them as claimed by the plaintiff. In respect to the area, it was held by the Second Division not to constitute a breach of the condition, as it was not an erection upon the land within its true purpose and meaning, nor was it rendered so by use. The purpose of the condition was to preserve the land conveyed for public purposes, and it was not violated by permitting the soil or space under the sidewalk to be used in such manner as is usual and common in cities and villages, as such use is in no sense inconsistent with that of the public for the purpose of a sidewalk for persons passing along the street.

The remaining question is whether the encroachment of the wall of the building at the north upon the land conveyed, sixteen inches at one end of a line sixty-four feet in length, and running down to two inches at the other end, constitutes, under the circumstances, such a breach of the condition as to forfeit the grant and entitle the plaintiff to re-enter. It may be said generally that such conditions in grants are not favored in the law. In the language of Chancellor KENT, "Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species *summum jus*, and in many cases hardly reconcilable with conscience." (4 Kent's Com. 130; *Craig v. Wells*, 11 N. Y. 315; *Woodworth v. Payne*, 74 id. 196.) There are instances where such conditions were enforced for reasons and upon grounds apparently technical, but, it is believed, that in such cases the ground upon which they were given effect was within the intention of the parties when the condition was inserted, however slight the violation was. (*Plumb v. Tubbs*, 41 N. Y. 442.)

The intent and purpose of the condition in this case was to

prevent the city from using the land conveyed for any other purpose than that mentioned in the grant; hence, it was prohibited from erecting upon it any house, building or other erection, except a public monument, and it cannot be said that the city itself has literally violated this condition, as it has not constructed or erected upon the land any building or structure whatever. But it is said that the condition was to the effect that the city should not permit any one else to make the forbidden erection, and as it has permitted Hawley to encroach upon it when building his wall several years ago, that the condition is broken and the estate forfeited. It was said when the demurrers were before us, that the forfeiture claimed is rested upon the conscious and willful sufferance of the city as amounting to a permission. The estate granted to the municipality cannot be forfeited by proof that a trespasser, without permission or authority from the city, express or implied, has appropriated to his own use a strip of the land a few inches in width. The city cannot be said to permit the unlawful use until it has knowledge of the facts. Hawley claims that this strip of land belongs to him, and there has never been a time since the city has had the notice of plaintiff's claim that it could remove the building without proving, as against Hawley, that he was a trespasser. This litigation has been on foot for nearly eight years in one form or another, and the only disputed question of fact has been the location of the true boundary line. The plaintiff claims that it is north of the south wall of the building, to the extent of sixteen inches at one end and two inches at the other. The defendants, Hawley and the city, take a different view of the matter, and both insist that the wall does not encroach on the land conveyed to the town in 1848. This dispute, involving a very small strip of land, depends largely upon the memory of witnesses as to the location of old monuments, and upon the ability of engineers to reproduce old surveys from courses and distances. A result absolutely accurate is seldom attained in such cases. It appears that the building north of the land conveyed to the city was located by com-

petent engineers about 1857, and it was then supposed by every one that the wall was on the true boundary line. The plaintiff was a member of the village board of trustees in 1864 and 1865. He saw these buildings erected first in 1857 and again in 1866, but not until nearly twenty years after did he make any claim against the city that it had broken the conditions of the deed. The parties who owned and erected the buildings, now claimed to constitute the encroachment, are dead, and an accurate location of the northerly boundary line of the grant has become more difficult by the lapse of time. All these considerations are important upon the question whether, under the circumstances, the city has done or knowingly permitted anything which amounts to a breach of the condition within any fair and reasonable construction of its terms or the intention of the parties when the grant was made. The most that can be said is that there is an honest mistake between the plaintiff on the one hand, and the defendants on the other, as to the location of the line, and, assuming that the plaintiff's theory as to the disputed fact must ultimately prevail, still, we think, there would be no such substantial breach of the condition as to authorize a forfeiture of the grant and a re-entry by the grantor, as there was no permission to encroach within the meaning of the condition. If it be admitted that this small strip of land was included in the plaintiff's grant to the municipality for public purposes, and that it has by an honest mistake been appropriated to a private purpose, in the manner disclosed by the record, the breach of the condition, if any, would be purely technical and of such an unsubstantial character as to warrant the conclusion that it was not within the purpose or intention of the parties to the conveyance. When a grantor of land seeks to re-enter for breach of a condition subsequent he should be required to establish something more than a technical encroachment through the action of strangers without the grantee's permission. It is not enough to show in this way that the letter of the condition is violated, but it must appear that its true spirit and purpose have been willfully disregarded by the grantee.

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Upon the undisputed facts of this case we think that no such permission as is contemplated by the contract of the parties was shown, and, therefore, no substantial breach of the condition has been made out.

Our conclusion, therefore, is that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE GOSHEN NATIONAL BANK, Appellant, v. THE STATE OF
NEW YORK, Respondent.

141	379
143	564
141	879
147	192

Upon a claim presented to the Board of Claims the following facts appeared: M., who was a county treasurer, had received the taxes collected from his county for state purposes, which he had neglected to pay over. The state comptroller made a demand for payment. M. was at the time cashier of the claimant, and as such had in his possession blank drafts addressed to the claimant's correspondent bank in New York, and as cashier had power to draw drafts on that bank for himself as well as for others, and upon the same terms. M. filled up one of these blank drafts with the amount due the state, making it payable to the order of the comptroller, signed his name thereto as cashier, and forwarded it to that officer as payment for such taxes. The comptroller received and indorsed it, and upon presentation it was paid by the New York bank; the obligation of M. and his county was thereby discharged and the proceeds applied to the uses of the state. When M. drew and signed said draft he paid no money to the claimant and had none on deposit with it to his credit; he made no entry thereof upon its books, and kept all knowledge of it concealed from the other officers of the bank; he was then hopelessly insolvent, and about a month thereafter absconded. The comptroller received the draft in good faith and without knowledge that it was issued by M. wrongfully and without authority. Held, that the state was not liable to refund the money so received; that the act of M. was within the scope of his general powers and apparent authority, and there was nothing in the form of the draft charging the state or its officers with notice that he was using the funds of the claimant to pay his individual debt; on the contrary, that the comptroller when he received it had the right to regard it as the property of the cashier regularly in his possession and proper to be used by him in payment of the taxes.

Comstock v. Hier (73 N. Y. 269); *Clafin v. F. & C. Bank* (25 id. 298), distinguished.

(Argued February 1, 1894; decided February 27, 1894.)

APPEAL from an award of the Board of Claims, made September 13, 1893, which awarded the claimant nothing.

The nature of the claim and the facts, so far as material, are stated in the opinion.

Henry Bacon for appellant. William M. Murray, as cashier of the Goshen National Bank, had no authority to draw a draft in favor of his personal creditors against its funds on deposit with its reserve agent, to pay his individual debts, without first paying the bank for such draft. His act in drawing such draft without previous payment was a fraudulent conversion of the property of the bank, and a breach of trust on his part, and as such, was beyond his apparent as well as his actual authority. (*Butts v. Woods*, 37 N. Y. 317; *Wadell v. R. R. Co.*, 163 U. S. 651, 657; *Rudd v. Robinson*, 61 N. Y. 339; *E. R. Co. v. Vanderbilt*, 5 Hun, 123; *S. N. Bank v. Burt*, 93 N. Y. 233; *State of Tennessee v. Davis*, 50 How. [U. S.] 447; *Williamson v. Wallace*, 12 Hun, 97.) This draft having been taken by Murray without consideration and in fraud of the rights of the claimant, it is incumbent upon the state to show that its officers and the state took it for value and under such circumstances as did not put it or them upon inquiry or give to it or them notice of its invalidity. (*Vosburgh v. Diefendorf*, 119 N. Y. 357; *Canajoharie Bank v. Diefendorf*, 123 id. 191; *Joy v. Diefendorf*, 130 id. 6.) Murray, as county treasurer of Orange county, received the moneys collected for state taxes as a state official, and when he misapplied them, or neglected to pay them over at the time fixed by law for such payment, he was liable individually and the sureties on his bond to the state were also liable. (Laws of 1874, chap. 502; *People v. Bd. Supers.*, 11 Hun, 306.) The form of the draft put the state and its officers upon inquiry and gave them notice of the invalidity of the paper. (*M. L. Ins. Co., v. F. S. S. & G. S. F. R. R. Co.*, 139 N. Y. 146; *Claffin v. F. & C. Bank*, 25 id. 293; *Wilson v. M. E. R. R. Co.*, 120 id. 145; *Moores v. C. N. Bank*, 111 U. S. 156; *Farrington v. S. B. R. R. Co.*,

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Statement of case.

150 Mass. 406; *Clark v. Bank of Albion*, 52 Barb. 592; *Pope v. Bank of Albion*, 57 N. Y. 126; *Gottberg v. U. S. N. Bank*, 16 Abb. [N. C.] 50.) The comptroller having taken this draft in settlement of an overdue and individual obligation of Murray, neither he nor the state became holders for value of the draft. The state and its officers neither parted with value on the credit of the draft, nor relinquished any security. (*Stalker v. McDonald*, 6 Hill, 93; *P. Ins. Co. v. Church*, 81 N. Y. 218; *Leslie v. Bassett*, 129 id. 523; *People v. Bank of North America*, 75 id. 547.) The state having received the proceeds of the draft, thus wrongfully taken from the bank, holds them subject to same rights as it held the draft. (*Comstock v. Hier*, 73 N. Y. 269.) When the state shall have refunded to the bank the proceeds of this draft, it will have a valid claim against Murray and his sureties for the balance due from him to the state treasury of which this draft was a conditional payment and can recover the same upon his bond. (*P. Ins. Co. v. Church*, 81 N. Y. 218; *Leslie v. Bassett*, 129 id. 523.) There is no reason why either the bank or the state should suffer. The state should return to the bank the moneys unlawfully taken from it, and can then collect from the sureties upon Murray's bond whatever deficit there is in his account with the state treasury. (*People v. Bank of North America*, 75 N. Y. 547.)

T. E. Hancock, Attorney-General, for respondent. William M. Murray, the cashier of the claimant, had full power and authority to draw the draft in question. The cashier of a bank is its chief executive officer, through whom the whole financial operations of the bank are conducted. (*M. Bank v. S. Bank*, 10 Wall. 604.) His acts, within the scope of general usage, practice and course of business conducted by the bank, will bind the bank in favor of third persons possessing no other knowledge. (*Barnes v. O. Bank*, 19 N. Y. 152; *Miner v. M. Bank*, 1 Pet. 46, 70; *W. Bank v. Truesdall*, 55 Barb. 602; *Lloyd v. W. B. Bank*, 15 Penn. St. 172.) A cashier has power and authority to draw checks and drafts

upon the funds of the bank deposited elsewhere. (*M. Bank v. Bank of Columbia*, 5 Wheat. 326.) If the directors of a bank, through inattention or otherwise, suffer its cashier to pursue a particular line of conduct for a considerable period, without objection, the bank will be bound by his acts. (*Caldwell v. M., etc., Bank*, 64 Barb. 333; *C. Bank v. Perkins*, 4 Bosw. 420; 29 N. Y. 554.) The courts have extended this doctrine to officers of corporations, and particularly to cashiers of banks, even where they have acted in violation of duty, and where they have assumed to do even that which the corporation itself could not rightfully do. (*Booth v. F. & M. N. Bank*, 50 N. Y. 400, 401; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30; *F. & M. Bank v. B. & D. Bank*, 16 id. 125; *Bissell v. M. S. R. R. Co.*, 22 id. 258; *Bank of Genesee v. Patchen*, 13 id. 309; 19 id. 312; *Briggs v. Spaulding*, 141 U. S. 132; *Martin v. Webb*, 110 id. 7.) The directors of the bank having, by inattention or otherwise, suffered Murray to pursue a particular line of conduct without objection, the bank is bound by his act. (*Caldwell v. M. Bank*, 64 Barb. 333; *C. Bank v. Perkins*, 29 N. Y. 554; *Booth v. F. Bank*, 50 id. 400, 401; *Phillips v. M. Bank*, 140 id. 556.) The relations of the cashier, Murray, to this claimant were analogous to those of principal and agent, and the rules governing that relation are applicable here. (*S. N. Bank v. Burt*, 93 N. Y. 233, 249; *N. & D. Bridge Co. v. P. Bank*, 3 id. 156; *Phillips v. N. Bank*, 22 N. Y. Supp. 254; *Boerum v. Schenck*, 41 N. Y. 182; *Gibson v. N. P. Bank*, 93 id. 87; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30; *F. L. & T. Co. v. Walworth*, 1 id. 433.) The controller received the draft in question in good faith, in payment of an honest debt, and his title to it, therefore, became valid. (56 N. Y. 478; 79 id. 183; 84 id. 420.)

PECKHAM, J. In the month of May, 1892, and for several months prior thereto, one William M. Murray was county treasurer of Orange county. He had received the taxes collected from that county for state purposes in January and

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February, 1892, and had neglected to pay over the amount thereof at the time fixed by law, and on the 5th of May, 1892, the comptroller of the state had demanded payment from him of the balance due for such taxes, which amounted to the sum of \$2,567.37. At the time of this demand Murray was, and for ten years prior thereto had been, cashier of the claimant bank. For the purpose of paying such taxes Murray, on the seventh of May, took a blank draft addressed to the Importers and Traders' National Bank in the city of New York, filled it up for the above amount, and making it payable to the order of the comptroller of the state of New York, signed his name to the draft as cashier. The bank had funds in the New York bank upon which the draft was drawn. Murray then, in response to such demand, forwarded the draft by mail to the comptroller as payment for such taxes. The comptroller received the draft, indorsed it as payable to the order of the state treasurer, who then indorsed it and procured it to be forwarded to the bank upon which it was drawn in New York, and that bank paid the same upon presentation, and on the ninth or tenth of May charged the amount thereof to the Goshen National Bank as the drawer of such draft. The draft was taken by Murray when he filled it up out of a book containing a large number of other blank drafts of the same form and which were used as occasion demanded by the claimant in drawing upon its funds on deposit in the Importers and Traders' Bank in New York. When Murray drew and signed the draft he paid no money to the claimant therefor and made no entry upon its books showing the drawing of the draft or his use of it, and he had not then and never has had since any money to his credit on deposit with the claimant. He was largely insolvent and a debtor to the bank at the time independently of this transaction, and in June, 1892, he absconded and has ever since remained a defaulter. He kept the fact of his drawing this draft concealed from the other officers of the bank until he absconded, and the fact was unknown until it was discovered in July following.

Notice of these facts was then given the comptroller, and he was requested to refund the moneys thus collected by him upon the draft, which he declined to do, stating that he had no power without legislative authority. The officers of the state applied the proceeds of the collection of the draft to the uses of the state, and in payment of its obligations and expenses. There is no claim that the comptroller, or any state officer, had any actual knowledge of the wrongful acts of the cashier before the comptroller was informed thereof in July, 1892. The Board of Claims has found that the comptroller received the draft in good faith, and without knowledge that it was issued by Murray wrongfully or without authority of the claimant. It was also proved on the trial that the cashier had the custody and possession of the blank drafts for the claimant, and that he had the right to sign drafts drawn by the claimant on its corresponding banks, and that he had the right to draw a draft on the corresponding bank of the claimant for himself upon the same terms that he had to draw a draft for a stranger.

The claimant upon these facts founds the legal liability of the state to pay back the moneys which it has received as payment of the taxes as above stated. It is alleged that the state was not a holder of the draft for value, inasmuch as it was received upon a precedent debt, and no value was parted with by the state when it received the same. It is also contended that the form of the draft was itself notice that the cashier was using the funds of the bank to pay his individual debt, and as the state had such notice it could not be a *bona fide* holder of the draft, and was, therefore, liable to refund the moneys received in payment of it.

First. We think the question as to whether the state was a holder of the draft for value or not does not arise in this case. Murray, as county treasurer, was behind in his payment of the taxes due from Orange county to the state. In order to discharge his obligation he transmits the draft in question. The state, through its officer, receives it and presents it to the bank upon which it is drawn, and that bank pays it, and the

state having received the money thereby discharges the obligation of Murray, and the taxes due from Orange county are thereby paid. The transaction is closed, and it cannot be that the drawer of the draft that has thus been paid can open up the whole matter, and claim to recover back the money which the state received in payment of the taxes due it. If the cashier, instead of sending this draft, had taken the money directly from the bank and paid the same to the state in satisfaction for the amount due for the taxes, I think no one would contend that the bank could recover it back from the state on the ground that the act of the cashier in taking the money was a fraud upon it or even a felony, and that the state had parted with no value at the time of the receipt of the money. I do not see that in this respect the case is altered by the interposition of the draft instead of the payment of the money in the first instance. The state receives in good faith (as we must assume on this point) the written direction of the claimant to a third party to pay the money to the state upon demand, and the state makes the demand accordingly, and the money is paid and the debt extinguished. The interposition of the draft makes no difference in principle after it has been paid. It is then the same as if the money had been originally paid instead of an order given for its payment. The order having been complied with and the original debt thereby satisfied, the transaction is closed, and may not be re-opened on this ground. This general principle may be gathered from the cases here cited. (*Justh v. National Bank*, 56 N. Y. 478; *Stephens v. Board of Education, etc.*, 79 id. 183, 187; *Southwick v. National Bank*, 84 id. 420, 436, 437.)

This is not the case of the diversion of commercial paper signed by one for the accommodation of another. In such case where accommodation paper has been diverted from the particular purpose for which it was made, the accommodation maker or indorser can defend when sued upon it by one who took the paper as security or to apply upon an antecedent debt without parting with any value at the time, by showing that the paper had been diverted from its intended

purpose. The holder of the paper brings his action upon it, and the accommodation maker or indorser shows that the plaintiff is not a holder for value, and that as to him the defense of diversion is available. Here the paper was not diverted, and in addition it has been paid according to its terms, and the payment has extinguished the debt for which the draft was given. No action is brought upon it and no defense is interposed. It has been paid and canceled. Nor is this like the case of *Comstock v. Hier* (73 N. Y. 269), cited by the counsel for the claimant. In that case the defendants had become the holders of a note upon which plaintiff was an accommodation indorser, but they became such under circumstances which showed they were not *bona fide* holders for value. Before the maturity of the note, the defendants sold it to one who by his purchase became a *bona fide* holder for value, and by reason of that sale the plaintiff was compelled to pay the note. He commenced his action against the defendants to recover the amount which he had thus been compelled to pay, and he obtained a judgment therefor which was affirmed in this court. The right to recover was based upon the fact that the defendants, by the sale of the note to one who became a *bona fide* purchaser, thereby wrongfully converted the note, and so became liable to the plaintiff for the amount of damages he sustained by reason of such conversion. And it was held that defendants could acquire no title to the proceeds of the note by the sale and transfer of it to a third person. And this upon the principle that a wrongdoer cannot better his title to property by a sale, for the proceeds of the sale will be the same as the property before the sale.

In this case the state was no wrongdoer, and in forwarding the draft for payment and receiving the money upon such payment, it committed no wrong, was guilty of no conversion and created no cause of action against it for the recovery of the money it thus received. There is nothing in the case of *Comstock v. Hier* which affirms in any degree the right of the claimant to treat the money received by the state in payment of the draft as if it simply represented the draft and the

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state were endeavoring in some form to enforce payment of the draft itself.

Second. Upon the question whether the form of the draft constituted notice to the state or its officer that the funds of the claimant were being used by the cashier to pay his private debt, we think that no notice of such fact was conveyed to the comptroller by this form of draft.

It is the right and duty of the cashier of a bank to sign the drafts drawn in its behalf upon its corresponding bank. This is part of the ordinary duties of such an officer, and affirmative evidence of his power to sign drafts appears in this record, and it also appears that he had the right to draw such draft for himself upon the same terms that he would have had in case of a third party, which means, I assume, upon payment to the bank of the amount of the draft.

There was an apparent authority to draw the draft; it appeared to have been drawn in the course of the employment of the cashier, and it was an act which was within the scope of his general powers.

We do not think that, in the case of a bank draft so drawn, the party receiving it would be charged with the duty of inquiry or with notice of the fact that the cashier had not paid for the draft, and that he was, therefore, using the funds of the bank to pay his private debt. He would only be so using them in case he did not pay for the draft, and its form might be the same even if he had paid for it in full. We think there is nothing unusual or suspicious in this form of making the draft payable direct to the creditor of the cashier, nor any notice that in so doing the bank's funds have been improperly used. Bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts and in other commercial transactions that they have almost acquired the characteristics of money. So long as they are drawn on behalf of a solvent bank and upon a solvent drawee, and signed by one of the officers usually signing such instruments, they are regarded by the commercial community very much the same as so much cash, and the fact that the draft was drawn

by a cashier directly in favor of his own creditor and sent to that creditor by him, would not naturally give rise even to the suspicion that there was anything irregular, fraudulent or wrong in the conduct of the cashier. The presumption would be that he had performed his duty and paid for the draft, and that it, therefore, was his property.

In *Phillips v. The Mercantile National Bank*,* just decided, we held the bank represented by plaintiff responsible for the drafts drawn by its cashier and duly paid by the defendant, although the cashier drew them for his own purpose and made them payable to the order of certain customers of the bank, whose names he forged, and who in truth were in no manner connected with the drafts and whose names were thus inserted by the cashier in order to give more semblance to the drafts as business paper. They were treated as fictitious payees, and the drafts were held good as against the bank because drawn by an officer who had apparent authority to sign them and in the usual course of business.

If this draft had been made payable to the order of one of the customers of the claimant and signed by the cashier and the customers' names forged by the cashier and the draft then sent to the comptroller (the customer never having any connection with the paper and his name being used the same as if it were a fictitious name) we should have here the case of *Phillips*.

That no fictitious name was used and that the draft was made payable directly to the comptroller and was sent him by the cashier, does not in our judgment call for a different decision. The case of *Claffin v. Bank, etc.* (25 N. Y. 293), was nothing like this case. In that the president of the defendant bank certified his own check and negotiated it. In an action upon such certification this court held that the by-law gave the president no right to certify his own check, nor was there anything in the position of a president of a bank which could be supposed to give any such authority. Judge SELDEN said the acceptance was void irrespective of the fact whether the drawer of the check had or had not funds;

* 140 N. Y. 566.

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the certification was nothing more than an acceptance, and from the nature of the case the president could not occupy the antagonistic position of accepting as agent of the bank his own check drawn upon it. When the comptroller received this draft he had the right, in the absence of any other notice than its form, to regard it as the property of the cashier, regularly in his possession, and proper to be used in the payment of the taxes due at that time.

We think the decision of the Board of Claims was right and it should be affirmed, with costs.

All concur.

Award affirmed.

In the Matter of the Probate of the Will of ADELINE D.
BERNSEE, Deceased.

141	389
164	245

Where the attestation clause to a will is full and complete, reciting all the facts necessary to a due publication under the statute, it is competent for the court to find that there has been a due publication, although but one of the subscribing witnesses testifies to the essential facts, and the other denies them.

In proceedings for the probate of a will which is contested on the ground that there was no due publication of the will, a beneficiary under it is incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication. What occurred at that time is a transaction between the testator and the witness within the meaning of the Code of Civil Procedure (§ 829), although the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witnesses.

A judgment will not be reversed for a technical error which it appears did not affect the result.

Reported below, 71 Hun, 27.

(Argued February 1, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 28, 1893, which affirmed a judgment entered upon a decree of the Surrogate's Court of Kings county admitting to probate the will of Adeline D. Bernsee, deceased.

Upon hearing of the application for the probate of said will, it was objected to as not executed according to law; that the testatrix was not competent to make a will and unduly influenced. These objections were overruled and the will admitted to probate. Upon appeal to the General Term the decree was reversed and issues framed which were ordered to be tried at Circuit. The trial there resulted in a verdict under which a decree was entered in the Surrogate's Court again admitting the will to probate.

Upon the trial Christian D. Bernsee, a son of the testatrix, and also one of the beneficiaries under her will, was called as a witness by the proponent and interrogated as to a conversation, in which he took no part, between the testatrix and the attesting witnesses, at the time the will was executed. This was objected to by the contestants and the objection sustained. Said witness was permitted to testify to a conversation occurring at another time, the substance of which, as well as the other material facts, are stated in the opinion.

William C. De Witt for appellant. The verdict of the jury was against the weight of evidence, contrary to law, and should have been set aside upon the motion for a new trial. (*S. F. Society v. Hopper*, 33 N. Y. 616; *Riggs v. A. T. Society*, 95 id. 503; *Merrill v. Rolston*, 5 Redf. 220; *Calhoun v. Jones*, 2 id. 34; *In re Dorman*, 5 Den. 112; *Shaw's Will*, 2 Redf. 107; *Lathrop v. A. B. F. Missions*, 67 Barb. 590.) Undue influence must be inferred from the situation of the decedent with her two sons, from their character and conduct toward her, from the beneficial results brought about in their behalf by the will, and from the general circumstances of the case. (*Marvin v. Marvin*, 3 Abb. Ct. App. Dec. 192; *Rollwagen v. Rollwagen*, 63 N. Y. 504-519; *Tyler v. Gardner*, 35 id. 559; Redf. on Wills, 514, 515, 521, 522; *Forman v. Smith*, 7 Lans. 443; *Esterbrook v. Gardner*, 2 Den. 543; *In re Budlong*, 54 Hun, 138; *Reynolds v. Root*, 62 Barb. 250; *Mowry v. Silber*, 2 Bradf. 133; *Lee v. Dill*, 11 Abb. Pr. 214; *Delafield v. Parish*, 25 N. Y. 9.) The judgment

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must be set aside for obvious error in the admission of the testimony of Christian Bernsee, who, as a chief beneficiary under the will and the main instrument in procuring its execution, was by statute prohibited from being a witness as to any transaction or communication by the deceased in which he had an interest. (Code Civ. Pro. § 829; *Lane v. Lane*, 95 N. Y. 494; *In re Eysaman*, 113 id. 62; *In re Dunham*, 121 id. 577; *Holcomb v. Holcomb*, 95 id. 316.) The absence of the testatrix's signature to the will at the time of its subscription by the witnesses, or the failure of the testatrix to declare it to be her signature in the witnesses' presence was absolutely fatal to the will under the decisions of this court. (*In re MacKay*, 110 N. Y. 611; *Jackson v. Jackson*, 39 id. 153; *Rugg v. Rugg*, 21 Hun, 383; 83 N. Y. 592.)

George G. Reynolds, Daniel Daly and William R. Syne for respondent. At the time of execution of the will the testatrix was of sound mind. (*Eam v. Snyder*, 46 Barb. 230.) The testatrix was under no undue influence. (*In re Smith*, 95 N. Y. 522; *Loder v. Whelpley*, 111 id. 250; *Seguine v. Seguine*, 4 Abb. Ct. App. Dec. 191; *Brick v. Brick*, 66 N. Y. 149.) The will was properly executed. (*In re Cottrell*, 95 N. Y. 329; *Trustees, etc., v. Calhoun*, 25 id. 422; *Thompson v. Seastedt*, 6 T. & C. 78; 62 N. Y. 634; *Brown v. Clark*, 77 id. 369; *In re Hunt*, 110 id. 278; *In re Voorhis*, 125 id. 765.) The exceptions to the admission of the letters, and to the statements made by the testatrix to her neice and to her nephew are without merit. (*Ridden v. Thrall*, 125 N. Y. 572; Stephens on Ev. art. 29.) The testimony given by Christian Bernsee was proper and competent. (*Cary v. White*, 59 N. Y. 336; *Holcomb v. Holcomb*, 95 id. 316; *Simmons v. Haven*, 101 id. 427.)

ANDREWS, Ch. J. Christian D. Bernsee was under our decisions an incompetent witness to testify to any conversation or transaction in his presence at the time of the execution and publication of the will. He was one of the chief bene-

ficiaries thereunder, and was directly interested in establishing due execution. What occurred at that time was a transaction between the testatrix and the witness, within the meaning of sec. 829 of the Code, although he took no actual part in the conversation and it was wholly between the testatrix and the attesting witnesses. If active participation in the conversation was necessary to exclude an interested witness, and he should as an observer be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method in every case of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of interested parties as if the witness actually participated therein. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Matter of Eysaman*, 113 id. 62; *Matter of Dunham*, 121 id. 575.)

The main controversy on the trial related to the question whether the will had been signed by the testatrix when it was attested by the subscribing witnesses. It is essential to the due publication of a will either that the witnesses should see the testator sign the will, or that such signature should have been affixed at some prior time and be open to their inspection. (*Matter of Mackay*, 110 N. Y. 611.) In the will in question the names of two persons are signed as attesting witnesses at the end of a full and complete attestation clause, reciting all the facts necessary to due publication under the statute. Both were sworn on the probate. One testified to a compliance in full with all the requirements to a due execution; that the testatrix signed the will in the presence of both witnesses, declared it to be her will, and that witnesses signed it in her presence and at her request. The other subscribing witness did not recollect that the testatrix signed the will, or that he saw her signature to the instrument at the time he subscribed it as a witness. It perhaps may be said that in the end the witness denied without qualification that the will was signed by the testatrix when he affixed his name, or that her signa-

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ture was upon the paper witnessed by him. This made at most a conflict of evidence upon an essential fact, and it was competent for the court to find that there had been a due publication, although but one of the witnesses testified to the essential facts, and they were denied by the other. (*In re Cottrell*, 95 N. Y. 329, and cases cited.)

The proponent sought to introduce the testimony of Christian D. Bernsee in aid of the testimony of the subscribing witness, who had testified that the will was signed by the testatrix in the presence of the attesting witnesses. But, upon objection by the counsel for the contestants, this evidence was excluded. Upon the main controversy, therefore, as to the publication of the will, the contestants cannot complain because of his being sworn in the case.

The contestants also opposed the probate on the ground of mental incompetency of the testatrix and of undue influence. The will unexplained, which practically disinherits two daughters in favor of two sons, seems unnatural, and this was doubtless a circumstance to be considered on the question of undue influence alleged to have been exerted by the sons. But circumstances are shown, not necessary now to detail, which the surrogate had a right to find influenced the testatrix in making her will, and to justify the conclusion that the will was the deliberate and intelligent expression of the will of a competent testatrix, uninfluenced by any improper interference on the part of the two beneficiaries. It is claimed that the testimony of Christian D. Bernsee bore upon the issue of undue influence. There is very little, if any, evidence which would have justified a finding that the will was procured by undue influence. Dr. Bellows, one of the subscribing witnesses, who failed to recollect the facts sworn to by the other subscribing witness as to the signing of the will by the testatrix, testified, among other things, in substance, that the son, Christian D. Bernsee, came to his office with his mother to get him to sign the will as witness; that the son, during the interview, had the will in his hands and conducted the ceremony of publication, and that the son asked the witness to

sign the paper as a witness, and when it had been signed by the witness, took it away with him. The testimony of Christian D. Bernsee contradicts that of Dr. Bellows as to some of the details of the transaction. The main contradiction is that his mother, and not himself, asked the witness to sign. The only bearing of the evidence of Dr. Bellows on the issue of undue influence consisted in his statements that the testatrix seemed nervous and excited, and his evidence that the son Christian took an active part in the ceremony of publication. But it clearly appeared from the other testimony, as well as by the testimony of Christian himself, that he accompanied his mother on this occasion for the purpose of having her will executed, and that he produced and read formal instructions for the execution of the will prepared by the lawyer who drew it. His action and participation was fully shown, and it is impossible to suppose that the matters of variance between his testimony and that of Dr. Bellows could have had any influence in the decision of the case. It would be contrary to the general rule to reverse a judgment for a technical error which did not affect the result. The witness was not permitted to testify as to the main matter for which he was called, and the other matters as to which he testified did not prejudice the contestants.

The judgment should be affirmed.

All concur.

Judgment affirmed.

ELIZABETH GREENLEAF et al., Appellants, v. THE BROOKLYN, FLATBUSH AND CONEY ISLAND RAILWAY COMPANY et al., Respondents.

The sole effect of the partition of land, by judgment in an action for that purpose, is to give title in severalty where before it was in common, and to settle and establish the title between the parties and their privies; it does not create title as against strangers where none existed before.

Where, therefore, in an action of ejectment plaintiffs claimed title under deeds given under a judgment in a partition suit, to which defendants were not parties and had no connection therewith, *held*, that in order to sustain the action, and in the absence of any proof of possession of the land by the parties to the partition suit or their predecessors in interest, plaintiff was bound to show a subsequent possession prior to the possession of defendant: also that mere payment of taxes, claim of title and assertions of ownership, even when made upon the land, did not show the actual possession which raises the presumption of title sufficient to maintain ejectment.

Also *held*, that admissions to the effect that plaintiffs owned the land, made by one from whom defendants took a deed, when neither he nor plaintiffs were in possession, did not bind the defendants who subsequently took possession claiming to be the owners, and who relied upon their possession as sufficient evidence of ownership as against plaintiffs.

Reported below, 71 Hun, 91.

(Argued February 2, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 21, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term dismissing the complaint.

This was an action of ejectment.

The facts, so far as material, are stated in the opinion.

Mornay Williams and *Frederic A. Ward* for appellants. The dismissal of the complaint in this action is based on the fact that the plaintiffs did not show either a connected chain of title back to the sovereign or a *pedis possessio* of the premises. Such dismissal was error. (132 N. Y. 408.) The pos-

session which is required is such possession as shall show that the title under the earlier conveyances had not been relinquished or abandoned by those holding at the time of the commencement of this action. (*Bliss v. Johnson*, 94 N. Y. 235; *Smith v. Lorillard*, 10 Johns. 338.) The new evidence on this trial is sufficient to meet this requirement. (*Jackson v. Scissam*, 3 Johns. 499; *Jackson v. Beard*, 4 id. 230; *Pitts v. Wilder*, 1 N. Y. 525; *Chadwick v. Fonner*, 69 id. 404; *Davies v. Pearce*, 2 Term Rep. 53; *Walker v. Broadstick*, 1 Esp. 458.) The holding of the court below that it was incumbent upon the plaintiffs, in order to establish *prima facie* their right to possession of the property in suit, to prove a proper conveyance from a party having the title, and that this required a conveyance from a person in peaceable possession of the land under claim of title at the time of the execution of the deed, or a grant from the sovereign, and a regular title from such grantees to themselves, is erroneous. (*Smith v. Gale*, 44 U. S. 509; *Ellicott v. Pearl*, 10 Pet. 412.) The plaintiffs proved a documentary title by the introduction of the Chancery proceedings in evidence, as the judgment in partition imported seizin, and showed that the parties to the suit were in the actual or constructive possession of the premises. (*Burhans v. Burhans*, 2 Barb. Ch. 398; 4 Kent's Comm. 365; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 3 id. 302; *Beekman v. Witter*, 2 Johns. 180; *Wallace v. Cox*, 71 Ill. 548; *Ensign v. McKinney*, 30 Hun, 249, 253; *Lawson on Pres. Ev.* 27; *Rex v. All Saints*, 7 B. & C. 789; *Moore v. Titman*, 33 Ill. 358; *Hartwell v. Root*, 19 Johns. 345; *Grignon v. Astor*, 2 How. [U. S.] 319; *Clapp v. Bromaghram*, 9 Cow. 569; *Prior v. Prior*, 49 Hun, 502; *Blakely v. Calder*, 15 N. Y. 617; *Howell v. Mills*, 56 id. 226; *Jordan v. Van Epps*, 85 id. 427; *Jenkins v. Fahey*, 73 id. 355, 361; *Cromwell v. Hull*, 97 id. 209; *Woodhull v. Little*, 102 id. 165; *Reed v. Reed*, 107 id. 545; *Cole v. Hall*, 2 Hill, 625; *Appelgate v. L. & C. C. M. Co.*, 117 U. S. 255.) The plaintiffs offered in evidence two tax receipts, to which objection was made and the objection sustained and the receipts

excluded. The exclusion of these receipts was error. (*Thompson v. Burhans*, 79 N. Y. 95.)

William C. De Witt for respondents. The plaintiffs having failed to show possession of the land in suit, either in themselves or their grantors, and having neglected to trace their paper title in regular course to the sovereign, the judgment of the General Term must be affirmed. (*Gardner v. Hart*, 1 N. Y. 528; *City of Cincinnati v. White*, 6 Pet. 431; *Clute v. Voris*, 31 Barb. 511, 518; *Miller v. L. I. R. Co.*, 71 N. Y. 380; *Edwards v. Noyes*, 65 id. 125; *Roberts v. Baumgarten*, 110 id. 380.) The judgment in partition introduced by the plaintiffs was not sufficient to prove seizin or possession against the defendants, who were not parties or privies thereto. (*DeGraff v. Hovey*, 16 Abb. Pr. 120; *Sheridan v. Andrews*, 49 N. Y. 484; *Campbell v. Hall*, 16 id. 579; *Ainslee v. Mayor*, 1 Barb. 169; *Douglas v. Howland*, 24 Wend. 35; *Clark v. Montgomery*, 23 Barb. 464; *Armstrong v. Munday*, 5 Den. 166; *Ten Eyck v. Frost*, 5 Cow. 346; *Monarque v. Monarque*, 80 N. Y. 326; *Denning v. Corwin*, 11 Wend. 648; *Bloom v. Burdick*, 1 Hill, 140; *Sanford v. White*, 56 N. Y. 356; *Jackson v. Newton*, 18 Johns. 355; *Northrop v. Wright*, 7 Hill, 476, 490; *Averill v. Wilson*, 4 Barb. 180; *Bigelow v. Fuich*, 11 id. 498; *Sparrow v. Kingman*, 1 N. Y. 242.) The appellants having failed to identify the premises described in their deed with the premises in the possession of respondents, their action failed. (21 N. Y. S. R. 946.) The declarations of the deceased surveyor were incompetent. (*Hunnicut v. Peyton*, 12 Otto, 333.)

EARL, J. The facts of this case are not materially different from those which appeared in the record when the case was before the Second Division of this court upon the former appeal (132 N. Y. 408). Now as then the plaintiffs rely mainly for their title upon a deed given under a partition of land by action between parties who are not shown ever to have had title to the land or the possession thereof.

A partition of land by action does not create title where none existed before. The sole effect can be to give title in severalty where before it was in common ; and it establishes and settles the title between the parties to the action and their privies. It cannot have greater effect than a voluntary partition of the land by and between all the parties interested therein.

Such an action is not a proceeding *in rem* as such a proceeding is known to the law. In such a proceeding involving property the *res* is seized and really made defendant, and an adjudication establishing its liability or its status, if regularly made, binds the whole world. It has been found difficult to give a precise and comprehensive definition of a proceeding *in rem* or a judgment *in rem*, and we need not attempt it now. (2 Phil. Ev. 5 ; 2 Smith's Leading Cases, 585 ; Freeman on Judgments [3d ed.], 654 ; *Woodruff v. Taylor*, 20 Vt. 65 ; *Munkin v. Chandler*, 2 Brock. 125.)

In a partition action the land is not seized, and in no proper sense is it proceeded against. The action is commenced, and the court obtains jurisdiction, not by service of process upon the land, but by service upon the persons jointly interested therein ; and without the presence of persons properly made parties the court obtains no jurisdiction and its judgment would be an absolute nullity, binding upon no one. Such an action is no more a proceeding *in rem* than a foreclosure action, or any other action the purpose of which is to enforce or establish the rights and interests of parties in land.

Therefore, as the plaintiffs do not trace their title to the original patentee thereof, and are thus unable to show a chain of paper title, they must fail to recover the land in this action because neither they nor those under whom they hold ever had the actual possession thereof. (*Miller v. Long Island R. Co.*, 71 N. Y. 380 ; *Roberts v. Baumgarten*, 110 id. 380.)

There need be no misapprehension as to what was decided upon the prior appeal. It was there held that the deeds under the partition judgment were competent evidence, and yet not of themselves sufficient evidence to show title in the plaintiffs

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good as against the defendants in possession, and that the plaintiffs in order to establish a right to recover in this action, in the absence of any possession of the land prior to their deeds, must show subsequent possession thereof prior to the possession of the defendants. This they utterly failed to do. Mere payment of taxes, claim of title, assertions of ownership made even upon the land, mere words however emphatic, do not show the actual possession which raises the presumption of title sufficient to maintain ejectment.

The defendants do not claim title under the partition action and have no relation whatever to that action. Assuming that they took a deed from William A. Engeman, he did not claim any title under that action, and it does not appear that he ever had any title or possession, and his admission, if he made one, that the plaintiffs owned the land, neither he nor they being at the time in possession of the land, does not bind the defendants subsequently taking possession of the land and claiming to be the owners thereof, and relying upon their possession as sufficient evidence of ownership against the plaintiffs.

We, therefore, see no reason to doubt that the judgment below is right and it should be affirmed.

All concur.

Judgment affirmed. _____

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C. ELLIOTT MINOR, as Assignee, etc., Appellant, v. CORNELIA A. BEVERIDGE, Respondent.

Where a stock broker sells, without due notice, stock purchased by him on a margin for a customer, he does not thereby, as matter of law, extinguish all claim against the customer for the advance made; the customer is simply entitled to be allowed as damages the difference between the price for which the stock was sold and its market price then or within such reasonable time after notice of sale as would have enabled him to replace it in case such market price exceeded the price realized.

Gillett v. Whiting (120 N. Y. 402), distinguished and limited.

Minor v. Beveridge (67 Hun, 1), reversed.

(Argued February 6, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 13, 1893, which overruled plaintiff's exceptions and ordered judgment in favor of defendant upon a decision of the court on trial at Circuit dismissing the complaint.

The nature of the action and the facts, so far as material, are set forth in the opinion.

Geo. W. Wingate and *Max Stern* for appellant. The sale made by *Gallaudet & Co.* did not constitute a conversion. (*Gillett v. Whiting*, 120 N. Y. 403; *Gruman v. Smith*, 81 id. 25; *Capron v. Thompson*, 86 id. 419; *Porter v. Wormser*, 91 id. 431; *Gallagher v. Jones*, 129 U. S. 193.) The sale of the stocks by the broker, if a breach of the contract, was a mere breach of a condition subsequent which did not forfeit the broker's right to recover what he had previously advanced for plaintiff's account if the owner sustained no actual damage by such sale. (*Capron v. Thompson*, 86 N. Y. 418; *Lee v. Loeb*, 89 id. 389; *Gruman v. Smith*, 81 id. 25; *Porter v. Wormser*, 94 id. 446; *Caswell v. Putnam*, 120 id. 157; *In re K. C. El. R. R. Co.*, 105 id. 115; *Nicol v. N. Y. & E. R. R. Co.*, 12 id. 121; *Towle v. Remsen*, 70 id. 303, 309, 311; *Boom v. Eyre*, 1 H. Bl. 273; *Campbell v. Jones*, 6 Term Rep. 570; *Carpenter v. Cresswell*, 4 Bing. 409; *Havelock v. Geddes*, 10 East, 555; *Davidson v. Gwynne*, 12 id. 381; *Robb v. Montgomery*, 20 Johns. 15; *Slocum v. Despard*, 8 Wend. 615; *Morris v. Sliter*, 1 Den. 59.) The plaintiff was entitled to go to the jury upon the question of whether or not the defendant had consented to the sale of her stocks. (*Bodine v. Killeen*, 53 N. Y. 93; *Dunn v. Hornbeck*, 72 id. 80; *McNeilly v. C. L. Ins. Co.*, 66 id. 23.) The failure of the defendant to keep her margin good was a breach of the contract upon her part, and the brokers were, therefore, absolved from a strict performance upon their part. (*Bush v. Lyon*, 9 Cow. 56.) Where the trial court has erred in any important question, the appellate court cannot affirm the judg-

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ment unless it appears as an inevitable necessity and beyond any question that the appellant cannot succeed upon a new trial. (*Muldoon v. Pitts*, 54 N. Y. 269; *Arthur v. Griswold*, 55 id. 400; *Guernsey v. Millet*, 80 id. 181; *Capron v. Thompson*, 86 id. 418, 421.)

Eugene L. Bushe for respondent. The sale made by Gallaudet & Co. was clearly irregular and constitutes a conversion. Gallaudet & Co. were bound to carry the stock until Mrs. Beveridge directed them to close the transaction, so long as she complied with the terms of the contract on her part, and to give her a reasonable notice of the want of sufficient margin, and of their intention to sell the stock, if the margin was not made good in accordance with the terms of the notice. (*Rogers v. Wiley*, 131 N. Y. 530; *Gillett v. Whiting*, 120 id. 404.) The contract entered into on the part of the broker is an entirety, and breach of one of its conditions on his part discharges the customer from liability. (2 Pars. on Cont. 518; *Debershe v. Page*, 36 N. Y. 537; 2 Add. on Cont. 62; *Mount v. Lyon*, 45 N. Y. 552; *Baker v. Higgins*, 21 id. 397; *Avery v. Wilson*, 81 id. 341; *Bleistein v. Studer*, 19 N. Y. S. R. 467.) The rights and obligations which enter into the relations of pledgor and pledgee attach to the customer and the broker. (2 Pars. on Cont. 113; *Reade v. Lambert*, 10 Abb. Pr. [N. S.] 428; *Ritter v. Cushman*, 7 Robt. 294.)

BARTLETT, J. The plaintiff, as assignee for the benefit of creditors of P. W. Gallaudet & Co., stock brokers, sued the defendant to recover a balance alleged to be due from her on a speculative account which she had with Gallaudet & Co. at the time of their failure, November 10th, 1890.

The cause was brought on for trial at a circuit court in the city of New York and at the close of plaintiff's case the complaint was dismissed and the exceptions ordered to be heard in the first instance at the general term. The general term

overruled the exceptions and ordered judgment for defendant, dismissing complaint, with costs. The plaintiff appeals from that judgment.

The question presented is whether the trial judge was justified in taking the case from the jury. The defendant's contention is that P. W. Gallaudet & Co. sold the stocks held in her account without notice, and for that reason their assignee cannot recover. The plaintiff insists that demand and notice were duly given to defendant through her son, as her agent, before sale of the stocks, and that she is bound thereby; and even if there was a sale without notice, the defendant can only be allowed her actual damages in reduction of plaintiff's claim. The evidence shows that Alven Beveridge, the son of the defendant, was the son-in-law of P. W. Gallaudet, and from the year 1881 to November 10th, 1890, the day when the firm of P. W. Gallaudet & Co. failed, was a clerk of said firm; that on the 30th of May, 1881, the defendant, represented by her son, opened a speculative account with the firm which, with additions and charges made therein, remained open until the day of the failure.

Our examination of the record satisfies us there is a conflict of evidence as to whether or not Alven Beveridge was the agent and representative of his mother, and accustomed for the nine years and more covered by her account, to receive the statements, demands and notices to which she was entitled, including the demand and notice in this action.

We are of opinion that the trial judge erred in not submitting to the jury, as requested, the question of notice, and whether it was reasonable and legal under the circumstances.

The plaintiff's counsel insists that he was entitled to submit still another question to the jury.

There was evidence in the case tending to show that the stocks sold for defendant's account on the 10th day of November, 1890, could have been repurchased in the open market within the next fifteen days below the prices realized upon the sale.

The plaintiff's counsel asked to go to the jury as to whether

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the defendant sustained loss by reason of said sale, and as to whether the defendant could not have replaced the stocks at the same price, or less price, than that for which they were sold, and within a reasonable time after the sale.

This request was refused. We think the trial judge should have submitted these questions to the jury under the settled law of this court that even where a stock broker sells without due notice stock purchased by him for a customer, on a margin, and held in pledge to secure the advance made by him for the purchase, he does not thereby, as matter of law, extinguish all claim against the customer for the advance, but the customer is entitled to be allowed as damages the difference between the price for which the stock sold and for which he received credit, and its market price then, or within such reasonable time after notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized. (*Gruman v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 id. 418-420; *Colt v. Owens*, 90 id. 368-371; *Porter v. Wormser*, 94 id. 431-446; *Wright v. Bank of the Metropolis*, 110 id. 237-246.)

The defendant's counsel relies on *Gillett v. Whiting* (120 N. Y. 402), decided by the Second Division of this court in June, 1890, as sustaining this last ruling of the trial judge. We are of opinion that the point actually decided in that case does not affect the cases in this court to which we have already referred.

In *Gillett v. Whiting* the plaintiffs were stock brokers and brought the action to recover a balance alleged to be due on account of stock transactions between the parties.

In submitting the case to the jury the defendant's counsel requested the court to charge, that in case the plaintiffs sold the stock without notice to the defendant as to the time and place of sale, by doing so, they violated their duty to the defendant and converted the stock to their own use.

The court refused to so charge, the defendant excepted, and the jury found a verdict for the plaintiff.

The sole question presented on the appeal was defendant's

right to have the jury charged that a sale of his stocks by the broker without notice was a conversion.

The Second Division of this court very properly held that the judge should have so charged the jury, and reversed the judgment. The effect of the conversion, if found by the jury, was not presented on the appeal.

The remarks, therefore, of the court as to the effect upon plaintiff's cause of action if conversion of the stocks should be established were *obiter*.

The cases we have cited were neither referred to in the briefs of counsel nor the opinion of the court.

The judgment appealed from is reversed, new trial granted, with costs to abide event.

All concur.

Judgment reversed. _____

SAMUEL I. KNIGHT, as President, etc., Appellant, v. SACKETT & WILHELMS LITHOGRAPHING COMPANY, Respondent.

Plaintiff and the H. L. Co. entered into an agreement to the effect that the company would make engravings upon stones from designs furnished by plaintiff, at a stipulated price for each engraving, make prints therefrom for him when requested at agreed prices, and would print from them for no one else, the ownership of the engravings to be in him, and of the stones in the company. Plaintiff paid for the engravings. The stones were subsequently sold under chattel mortgages executed by the company, and thereafter came into defendant's possession. Plaintiff tendered the value of the stones themselves, and demanded delivery, which defendant refused. In an action for conversion, *held*, that the complaint was properly dismissed, as plaintiff failed to show any property in or right to the possession of the stones; that if, by parting with them, the company disabled itself from performing the agreement, while it exposed itself to an action for the breach, no rights of plaintiff attached to and followed the stones into the hands of strangers, at least only such as equity might recognize.

(Argued February 6, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 8, 1892, which affirmed a judgment in favor of

defendant entered upon a decision of the court on trial at Circuit, without a jury, dismissing the complaint, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William O. Campbell for appellant. Title to personal property cannot be divested except by the fault or with the consent of the owner. (*Hull v. Robertson*, 2 N. Y. 293; *Eli v. Ehle*, 3 id. 506; *Wooster v. Sherwood*, 25 id. 278; *Brower v. Peabody*, 13 id. 121; *Saltus v. Everett*, 20 Wend. 267; 2 Kent's Comm. 621; *Boyce v. Brockway*, 31 N. Y. 490; *Bussett v. Spofford*, 45 id. 387; *Barnard v. Campbell*, 55 id. 456; *Gillett v. Roberts*, 57 id. 34; *Everett v. Coffin*, 6 Wend. 603; *Williams v. Merle*, 11 id. 80; *Hoffman v. Carow*, 22 id. 285-294; *Prescott v. De Forrest*, 16 Johns. 159.) The plaintiff, having a property right in the pictures or drawings on the stones, acquired the right to the stones themselves by paying to the defendant the value of the stones. (2 Code Napoleon, arts. 566, 567, 569, 570, 571, 572, § 2.) One tenant in common can maintain trover as for conversion against his co-tenant. (*Hudson v. Swan*, 83 N. Y. 552; *Fiero v. Betts*, 22 Barb. 633; *Hyde v. Stone*, 7 Wend. 354; 9 Cow. 230; *Gilbert v. Dickerson*, 7 Wend. 449; *Mumford v. McKay*, 8 id. 442; *Farr v. Smith*, 9 id. 338; *White v. Osborne*, 21 id. 72.)

Artemas B. Smith for respondent. This appeal presents no question which this court will review. (Code Civ. Pro. §§ 1010, 1022, 1023; *Bridger v. Weeks*, 30 N. Y. 328; *Wood v. Lary*, 124 id. 83, 87; *Gilman v. Prentice*, 132 id. 488, 492.) The appellant's evidence shows that he has acquired no property in the stones or right to the use or possession of them. (*Gregory v. Striker*, 2 Den. 629; *Dodworth v. Jones*, 4 Duer, 201; 2 Pars. on Cont. 86; 2 Story on Bail. § 2; 2 Kent's Comm. 559.) Appellant failed to show any violation of his rights, or damages sustained by him. (*Lennon v. Smith*, 124 N. Y. 581; *Stevens v. Gladding*, 17 How. [U.S.] 447.)

The rulings upon evidence were correct. (*Hillreigel v. Manning*, 97 N. Y. 60; *Gumb v. T. T. S. R. R. Co.*, 114 id. 411.)

GRAY, J. The plaintiff brought this action to recover damages of the defendant for an alleged wrongful conversion of certain personal property, consisting in lithographic drawings or engravings. Upon the trial, the complaint was dismissed upon the plaintiff's case. According to his evidence, being desirous to obtain lithographic engravings for use upon covers of writing tablets, he made an oral agreement with the Hatch Lithographing Company that the company should make engravings upon stones for him, from designs to be furnished at a stipulated price for each engraving, and that colored prints should be made therefrom when requested, at agreed rates. He testified that it was their agreement that the ownership of the engravings should be in him and of the stones in the Hatch Company and that the duration of the agreement was not fixed. It was admitted that the plaintiff had paid bills for the labor of engraving the stones. Chattel mortgages were given by the Hatch Company upon its properties and, under foreclosure, these stones were sold and, ultimately, came into the possession of the defendant; which refused to deliver them to the plaintiff, when he tendered the mere value of the stones themselves.

The dismissal of the complaint, on the plaintiff's showing, was undoubtedly right; for he failed to show that he had any property in, or any right to, the possession of these stones at any time. He never had any interest in the stones except under his contract with the Hatch Company; which gave him the right to have impressions or prints made from them. It is true that he had paid for the labor of engraving them; but it is very clear from his evidence, that, by the agreement into which he entered with the lithographing company, the ownership of the stones continued in the company and that he was only to have his printing done at so much per thousand sheets. The contract between him and the Hatch Company was one which bound the latter to render its skilled services and which

secured to it a fixed compensation. The appellant suggests that the transaction came under a head of bailments known as *locatio operis faciendi*; but that would only have been the case if the plaintiff had furnished the stones and had employed the lithographers to do the engraving upon them. The learned trial judge thought that a tenancy in common of the stones had been created, and his dismissal of the complaint was upon the ground that trover for conversion would not lie, unless the plaintiff could claim as sole owner. But we do not think that the contract testified to made out an ownership in common. Ownership may rest upon agreement; but no inference can be drawn from the plaintiff's version of the transaction that the Hatch Company had agreed that the stones, as engraved, should be owned in common. The evidence was that the stones were to belong to the Hatch Company and that it was not to print from them for anybody else. The plaintiff says: "These designs were to be held upon these stones for me for no purpose whatever except to do my printing as I might order it; that is all. That is the reason they were to be kept upon the stones for me." Taking the plaintiff's statement of the transaction, it is plain that the Hatch Company had bound itself to hold, and to print from, these particular designs, (the ownership of which seems to have been secured to the plaintiff in part, if not wholly, by copyright) whenever ordered by, and solely for, the plaintiff at stipulated rates. This agreement, in its exclusive features, rested upon the consideration of what plaintiff was to pay at once towards the expense of doing the work of engraving and upon the profits to be derived from the business to be given thereafter.

The agreement negatives the idea of any ownership in plaintiff of these stones, by the nature of its requirement of services to be rendered and from the absence of any claim to own the stones themselves. Nor was there any confusion, or an admixture of any property of the plaintiff with, or in, the property of the Hatch Company. The agreement testified to, again, negatives that idea. To that agreement plaintiff could

hold the company and if, by parting with the stones, it disabled itself from performing its agreement, it exposed itself to an action for its breach. In such an event, however, no rights of the plaintiff would attach to and follow the stones into the hands of strangers; other than, at furthest, such as equity might recognize. It is quite possible that such an agreement would be recognized and protected in a court of equity and that relief might be obtained by injunction or otherwise; if necessary to protect the plaintiff's rights against an improper use, or a destruction of the lithographs. But it is not necessary or proper to decide the question here, and upon such proofs, whether the defendant acquired any greater or other rights to the use of these engraved stones, than were possessed by the Hatch Company. Nor does it appear that the defendant refuses to carry out the agreement made with the Hatch Company. So far as it appears, the defendant may be quite willing to carry out the original agreement and to print for the plaintiff at the rates stipulated for with the Hatch Company. However that may be, we hold that this plaintiff never had any title to, or any right to the possession of, these stones; and that the agreement, which he testified to, was one, simply, for the performance of services in the making and the transferring of lithographic engravings. In any view of the case, it is impossible to see how the plaintiff could allege that there had been any wrongful conversion of his property by the defendant, and the judgment appealed from should be affirmed, with costs.

All concur (BARTLETT, J., is of opinion that Hatch Co. and plaintiff were, under the contract, tenants in common of the stones and engravings thereon, but concurs on ground that plaintiff invoked an improper remedy).

Judgment affirmed.

MARY E. RILEY, Appellant, v. ASHBEL W. RILEY et al.,
Executors, etc., Respondents.

Plaintiff had a cause of action against R., defendants' testator, upon a parol agreement; the right of action accrued March 31, 1882. On March 30, 1888, a summons and complaint in an action by plaintiff against R. upon said cause of action was delivered to the sheriff of the county wherein the parties resided with the intent that the same should be actually served. The sheriff on that day attempted in good faith to serve the papers, but R. was at the time sick and his physician refused access to him; he died four days thereafter. The claim was presented to defendants, who rejected it, and upon refusal to refer, this action was commenced thereon October 2, 1889. The Statute of Limitations was pleaded as a defense. *Held*, that there was an attempt to commence the action against R. within six years, which, under the Code of Civil Procedure (§ 899), was equivalent to its commencement; that plaintiff did not lose the benefit of this by failure to serve the summons personally or to commence service by publication within sixty days thereafter, as plaintiff was prevented from doing this by R.'s death; that the delivery of the process to the sheriff saved the claim against the bar of the statute up to the date of such death, and then it was further suspended by said Code for eighteen months (§ 403), and as, within that time the action was commenced it was not barred by the statute.

Riley v. Riley (64 Hun, 496), reversed.

(Argued February 8, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1892, which affirmed a judgment in favor of defendants entered upon the report of a referee.

This action was brought to recover \$2,500, with interest thereon from May 1, 1882, which the complaint alleged belonged to plaintiff and had been received by Ashbel W. Riley, defendants' testator. The Statute of Limitations was pleaded as a defense.

The facts, so far as material, are stated in the opinion.

Walter S. Hubbell for appellant. Plaintiff's cause of action was not barred by the Statute of Limitations. (Code Civ. Pro. § 403; *N. T. Bank v. Wetmore*, 124 N. Y. 241; *Shel-SICKELS*—VOL. XCVI. 52

lington v. Howland, 53 id. 371; *Clare v. Lockard*, 122 id. 263.) The denial of the motion to revive the action attempted to be brought in 1888 is not *res adjudicata*. (*Howell v. Mills*, 53 N. Y. 322.)

F. L. & J. E. Durand, for respondents. The claim in suit was barred by the Statute of Limitations. (*Mills v. Mills*, 115 N. Y. 80.) The attempt made by the sheriff of Monroe county to serve upon the decedent the summons and complaint placed in his hands for that purpose on the 30th of March 1888, not being followed by an actual service on him, or a first publication of said summons in compliance with section 399 of the Code of Civil Procedure, as that section then stood, was not the commencement of an action within the meaning of said section and was a nullity. (*Estes v. Wilcox*, 67 N. Y. 264; *Adsit v. Butler*, 87 id. 585; *In re N. T. Bank*, 124 id. 248; Code Civ. Pro. § 438, subd. 6.)

O'BRIEN, J. The plaintiff was defeated in this action upon the ground that the cause of action was barred by the Statute of Limitations. That ruling presents the only question involved in this appeal. The learned referee deduced that conclusion from the following facts which he found: The plaintiff is the widow and the defendants are the executors of Ashbel W. Riley, who died on the 3d of April, 1888. The deceased, several years before his death, owned some real estate, for the sale of which negotiations were pending and substantially completed, but the plaintiff, who had a dower right in the same, refused to execute the deed unless a portion of the purchase price was paid or secured to her. It was finally agreed between all the parties in interest that \$2,500 of the price should be paid to her, and upon this agreement she signed the deed, which was delivered to the purchaser on the 31st of March, 1882, and on the same day the whole of the purchase price was paid to the deceased, including the sum belonging to the plaintiff, which was paid to him for her. It does not appear that any part of the money so received was

ever paid to the plaintiff by her husband, and this action was brought to recover the same, with interest. On the 30th of March, 1888, four days before the husband's death, a summons and complaint, in an action by the plaintiff against her husband for the recovery of the money and interest, was delivered to the sheriff of the county where the parties resided, with intent that the same should be actually served on the defendant named therein. The sheriff attempted in good faith to make the service, but the physicians in charge of the deceased, in what proved to be his last sickness, did not allow access to him, and so no service was made, as the husband grew rapidly worse and died as before stated. The claim was subsequently presented to the executors, who rejected it, and upon their refusal to refer the same, the present action was commenced against them by the delivery of the summons and complaint to the sheriff for service on October 2d, 1889, the defendants appearing January 31st, 1890.

It is provided by section 403 of the Code that the term of eighteen months after the death, within the state, of a person against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator. The action was commenced within that time after the death of the testator and, unless the claim was already barred at or before his death, was commenced in time. We must assume upon the facts found that the cause of action accrued when the husband received the money. There is no finding that he held it by virtue of any trust or under such circumstances as would require a demand before suit under the provisions of section 410. So far as appears it was the ordinary case of money received by one party for the use of another, under a duty to pay it over at once, and no demand was necessary before the right of action accrued. The plaintiff, therefore, could have brought the action as early as March 31, 1882, and the six years' term of limitation, consequently, expired on March 31, 1888. (*Wood v. Young*, 141 N. Y. 211.) But on the previous day the plaintiff caused to be delivered to the sheriff the summons and complaint in

an action upon the claim, with the intent of having the same served, and the question here must turn upon the legal effect of that act. By section 399 of the Code an attempt to commence the action is equivalent for every purpose of the statute to its actual commencement. It cannot be doubted that there was in this case such an attempt to commence the action as the section referred to contemplates. But in order to secure to the plaintiff the benefits of this section it is urged that the delivery of the summons to the officer must be followed within sixty days from the expiration of the period of limitation by personal service or the first publication of the summons pursuant to an order. But here the plaintiff made the attempt in good faith and was prevented from doing the other things contemplated by the section by the death of the defendant named in the process four days afterwards. Where, under this section, there is an attempt to commence the action during the life of the defendant by delivery of process to the officer, and the other steps prescribed by the section are prevented by the death of the defendant before the expiration of the sixty days, the attempt is not thereby rendered wholly nugatory for all purposes. To give the statute such a construction would in many cases defeat its manifest purpose. The moment the process was delivered to the officer with intent that service should be made, the operation of the statute was thereby suspended, subject to compliance with the other provisions of the section when compliance is possible. But when such compliance is prevented without any neglect or fault of the plaintiff, who has complied with the law, the attempt should have some effect. In reason and justice it should be held that the suspension of the operation of the statute upon the cause of action, produced by the delivery of the process to the officer, continued up to the time of the death, and that this condition was not changed or affected by the fact that it then became impossible to make service of any kind. Enough was done under the section to suspend the statute to the date when further compliance became impossible, and what was accomplished in this way

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was not lost by an event over which the plaintiff had no control. The personal representatives of the deceased cannot now, for the purpose of interposing the Statute of Limitations to the claim, get the benefit of the four days that elapsed before the death, and while the process was in the hands of the officer, any more than he could himself had he lived and service had been made upon him on the last day contemplated by the section. The delivery of the process to the officer under the circumstances saved the claim against the bar of the statute up to the date of the testator's death. The operation of the statute was further suspended for eighteen months by § 403, and not till the expiration of that period could the statute begin to run against the cause of action. (*Hall v. Brennan*, 140 N. Y. 409.) It follows that the claim was not barred at the date of the commencement of this action, and that the learned referee erred in dismissing the complaint on that ground.

There are no findings and there is no proof that would warrant the conclusion that the claim was paid before the death of the husband though that defense is pleaded. Nor can it be held, as the case now stands, that there was an agreement to compensate her by will, which was carried out and accepted. It was competent for the parties to adjust the claim in that way. (*McLaughlin v. Webster*, 141 N. Y. 76.) But whether they did or not was a question of fact to be found upon proof and in regard to which the findings of the referee are silent.

The judgment should, therefore, be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

JOSEPH A. IASIGI, Appellant, v. CLARA ROSENSTEIN,
Respondent.

Plaintiff through a broker sold to defendant certain parcels of canary seed described in the broker's note as to each parcel as "March steamer shipment from Turkey," the name of the steamer being given. After stating the price and that the seed was to be paid for within a time specified "from date of delivery on dock in New York," each note contained this clause: "Goods to be taken from dock on arrival of steamer when ready for delivery." The parcels were shipped by the steamer named to Liverpool, and there transhipped to another steamer which brought them to New York, where they were tendered to defendants, who refused to accept solely on the ground that the seed was not brought by the steamer named direct to New York. On trial of an action to recover damages plaintiff offered to prove that at the time of sale there was not and never had been freight steamers sailing direct from Turkey to New York, and that the invariable custom was to carry goods to Liverpool, and there transfer them to a steamer for New York. This evidence was excluded. *Held*, error; that the broker's notes did not in explicit terms require a shipment direct in the same steamer from Turkey to New York; that while the steamer of shipment was identified that of arrival was not, and the language of the contract admitted of a doubt as to whether the intent was that both were to be the same, and to solve this doubt the evidence was proper.

Iasigi v. Rosenstein (65 Hun, 590), reversed.

(Argued February 7, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 8, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit dismissing the complaint.

This action was brought to recover damages for defendant's refusal to receive three parcels of canary seed sold to him by plaintiff.

The facts, so far as material, are stated in the opinion.

David Keane for appellant. The parties contracted with reference to established customs and usages, which were as much a part of their contract as if, after the words "March

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shipment from Turkey," they had written "according to the customary and usual mode of shipment." It was competent to prove the custom and usage, as it did not contradict the written agreement, and simply annexed an incident to the contract which had not been expressed, because it was so well known that it was needless to incorporate it, and the exclusion of this evidence by the court was error. (*Lowery v. Russell*, 8 Pick. 360; *Robinson v. U. S.*, 13 Wall. 363; *Robertson v. N. S. S. Co.*, 139 N. Y. 416.) The error of the General Term consisted in construing the contracts, wholly ignoring any custom or usage in the minds of the parties when they made the contracts. (*McPherson v. Cox*, 86 N. Y. 476; *Hinton v. Locke*, 5 Hill, 437; 2 Pars. on Cont. [7th ed.] 541; *Hudson v. Ede*, L. R. [2 Q. B.] 567.) Evidence of usage has never been considered within the rule which precludes the admission of parol testimony in the interpretation of written contracts. (*Renner v. Bank of Columbia*, 9 Wheat. 581; *Coit v. C. Ins. Co.*, 7 Johns. 385; *Smith v. Willard*, 3 B. & A. 728; *Chaurand v. Angerstein*, Peake N. P. 43; *Spicer v. Cooper*, 1 Q. B. 424; *Hinton v. Locke*, 5 Hill, 437.) An unimportant circumstance not expressed in a contract will not be imported into it by a liberal construction of the language used for the purpose of defeating the contract, especially if there is a reasonable doubt whether the parties intended it to be included in the description of the thing in reference to which they were dealing. (*Cunningham v. Judson*, 100 N. Y. 79.)

H. Applington for respondent. The complaint herein was properly dismissed. (Benjamin on Sales, §§ 586, 588, 600; *Lovett v. Hamilton*, 5 M. & W. 639; *Hill v. Blake*, 97 N. Y. 216; *Welch v. Gossler*, 89 id. 540; *Shields v. Pettie*, 4 id. 122; *Bidwell v. Overton*, 26 Abb. [N. C.] 402; *Clark v. Fry*, 121 N. Y. 470; *Tobias v. Lissberger*, 105 id. 404.) The appeal herein being from the judgment only, no order having been entered denying a motion for a new trial, and no request having been made by the plaintiff to go to the jury, there is

no question of fact for review before this court. (*Mattheos v. Meyberg*, 63 N. Y. 656; *Dresser v. B. F. & M. Ins. Co.*, 47 Hun, 153; *Nichols v. Martin*, 35 id. 168.)

FINCH, J. The plaintiff, through a broker, sold to the defendants three parcels of Smyrna canary seed, which the defendant agreed to buy, but on its arrival refused to receive. The broker's sale note of the first parcel, with its indorsements, is as follows: "New York, March 14—87. Sold for % Messrs. Iasigi & Co., of Boston, to Messrs. C. Rosenstein & Co., five hundred bags good merchantable quality Smyrna canary seed, March steamer shipment from Turkey, at two and three-quarter ($2\frac{3}{4}$) cents per lb. gross weight for net, less 1 per cent for cash, in 10 days from date of delivery on dock in New York. No tare—no charge for bags. Goods to be taken from dock on arrival of steamer, when ready for delivery. Damaged bags, if any, to be taken at fair allowance. Name of steamer to be given soon as known. George M. Black, broker, 60 New st. Indorsed: Accepted, New York, March 16th, 1887. C. Rosenstein & Co. Second indorsement: Name of steamer reported, Aleppo. No arrival, no sale. New York, April 22, 87. George M. Black, broker."

The note for the second parcel was in the same form, and that for the third differed only in the fact that the name of the steamer, as the Aleppo from Rodosto, was mentioned in the body of the note. The seed was all shipped in March, on board the steamer Aleppo, sailing from Rodosto, in Turkey, but was transshipped at Liverpool from that vessel to the Aurania, which brought it to New York, where it was tendered to the buyer. There is no question of its identity. It was the same merchantable Smyrna canary seed which had been shipped in March by the steamer Aleppo from Turkey. There is no dispute as to quality or quantity, and the exact identity is explicitly admitted. It was refused simply and only because it was not brought by the Aleppo to New York direct, but was transferred at Liverpool to the Aurania. It is not now contended that the market or the customer could

appreciate a practical difference, or that there is any meritorious ground for the objection; but it is broadly asserted that the buyer has the right to make his own contract on his own terms, and that these, however unimportant, cannot be disregarded by the courts.

But the plaintiffs offered to show by the broker who negotiated the sale that there was not at the time, and never had been, freight steamers sailing direct from Turkey to New York, but that the invariable custom and usage was to carry the goods to Liverpool and there transfer them to a steamer for New York; and that such custom and usage was well known to all persons engaged in the trade. This evidence was rejected and a verdict rendered for the defendants, which the General Term has affirmed.

That affirmance is put upon the ground that the terms of the contract provide for a shipment on a named steamer from Turkey direct to New York; that an arrival of the goods at the latter port by the *Aleppo* is essential matter of description and a condition precedent to the buyer's obligation to accept; and that the usage or custom sought to be proved would contradict the terms of the contract and for that reason is inadmissible. There is no doubt of the general rule, and it may be conceded for the present to cover matters of description which are seemingly unimportant, but the question here is as to the application of the rule to the facts.

The broker's notes do not, in explicit terms, require a shipment direct and in the same steamer from Turkey to New York. Such a construction is matter of inference from words which do not necessarily and inevitably involve that inference. The steamer of shipment must be the *Aleppo* from Turkey. The steamer of arrival is not identified. It may or may not be the one first mentioned, or another and different one. If it *must* mean the *Aleppo*, and *can* mean no other, the General Term were right; but if it *may* mean the steamer of arrival, even though not the *Aleppo*, then there is an ambiguity, a doubt about the real contract intention, which may be solved by proof of custom and usage. I think that is the truth.

Observe the language of primary description ; that intended to identify the goods and prescribing the date and character of the shipment. There are two elements provided : First, the property bought is to be "good merchantable Smyrna canary seed," and second, "March steamer shipment from Turkey." That ends the description of what was agreed to be bought, for the note goes at once to the question of price and other details of the contract. Plainly, for some reason, the parties contented themselves with saying simply "shipment *from* Turkey," and omitted to add to New York, or other words indicating a direct or unbroken voyage, and this omission occurs in the formal description of the goods, and where it was not to be expected if a direct voyage was meant. The note then passes to other details. One is "goods to be taken from dock on arrival of steamer when ready for delivery." This sentence, most certainly, was no part of the description of the goods bought, and was not intended to qualify or affect that description. It merely made a delivery on the dock, from the steamer having the goods, a sufficient delivery. It does not say what steamer, or dictate that it must be the Aleppo. The final provision, "Name of steamer to be given soon as known," undoubtedly refers back to steamer of shipment. But it is said that in all the terms of the broker's note but one steamer is referred to. That, however, is the precise question. *Was* only one referred to ? The language admits of the possibility that two were referred to ; the steamer of shipment and the steamer of arrival ; and it is in view of that possible doubt as to the real purpose and intention of the parties that the evidence of usage and custom was offered. The moment it is shown that there was no steamer sailing direct from Turkey to New York, that all importations from that country by steam came first to Liverpool and were there transshipped, and that the goods bought, if transported by steam, must come and could come in no other way, and that both parties and their broker knew the fact, all doubt and ambiguity disappears. We see at once that the provision for delivery, which says simply "steamer," does not and cannot

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mean the Aleppo, was not so intended or understood, but refers to the steamer of arrival after the necessary and contemplated transshipment at Liverpool. The proof does not contradict the note: it simply explains it, and enables us to choose between two possible constructions, either of which the instrument will bear.

We think the evidence should have been admitted, and that for the error in excluding it the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed. _____

PATRICK F. FITZGERALD, Appellant, v. WILLIAM J. MORAN
et al., Respondents.

By a building contract it was provided in the specifications as to plastering that "King's Windsor cement" should be used and that the work should be done under the direction of a superintendent of King & Co. In another specification it was directed that the cement should be mixed "with equal parts good, sharp and dry sand." It was also provided that in case any dispute should arise respecting the true construction of the specifications, the same should be decided by B., the architect, "whose decision shall be final and conclusive." Plaintiff took a sub-contract to do the plaster work. In an action to foreclose a mechanic's lien, it appeared that the mixture used was two parts sand to one of cement. Evidence was given by plaintiff to the effect that the variation from the specifications was by the direction of said superintendent. A letter written by the architect to plaintiff was also given in evidence, in which the writer, after stating that plaintiff was not doing the work according to contract, or following the instructions of the superintendent, required him to follow those instructions "to the letter." Held, that the superintendent had no authority under the contract to change the proportions of the mixture as fixed by the specifications, nor did the letter give any such authority; and so, a finding that plaintiff failed to perform his contract was proper.

(Argued February 9, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made August 11, 1892, which affirmed a judgment in

favor of defendants entered upon a decision of the court on trial at Special Term dismissing the complaint.

This action was brought to foreclose a mechanic's lien filed by plaintiff, a sub-contractor, against defendants, the contractor and owner.

Plaintiff contracted to do the plasterer's work according to the written specifications of a building contract between the owner and the principal contractor. The defendants set up as a defense a substantial breach of the contract on the part of plaintiff.

The further material facts are stated in the opinion.

Thomas F. Magner for appellant.

Thomas E. Pearsall for respondents. Authority upon the part of King's man to vary the terms of the contract cannot be implied from a reading thereof. (*Genovese v. Mayor, etc.*, 23 J. & S. 397.) No rule of construction can be cited which bears out the plaintiff's claim; and the equities are clearly with the defendant. (*Coleman v. Beach*, 97 N. Y. 545; *Clark v. N. Y. L. Ins. Co.*, 64 id. 33; *Parshall v. Egger*, 54 id. 18; *Stapenhurst v. Wolff*, 3 J. & S. 25; *Russell v. Allerton*, 108 N. Y. 288.) The plaintiff cannot recover in this action without having first obtained the certificate of the architect. (*Voorhis v. Mayor, etc.*, 46 How. Pr. 117; *Glacius v. Black*, 50 N. Y. 145.)

ANDREWS, Ch. J. It is not claimed that the plaster was mixed with equal parts of sand and cement as required by the specifications. But the plaintiff claims that in preparing the mixture he followed the directions of the agent of J. B. King & Co., the manufacturers of the cement, and that by his direction the mixture was made of two parts of sand to one of cement. The specifications in respect to the plastering, after providing that King's Windsor cement should be used, and that the work should be done under the direction of a superintendent of J. B. King & Co., in the next specification

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directed that the cement should be mixed "with equal parts good, sharp and dry sand." There is some evidence tending to show that the variation from the specifications in the proportions of sand and cement was directed by the superintendent of King & Co. But it is plain that the provision that the plastering should be done under the direction of the superintendent of King & Co. had relation to the manner of applying the plaster, and gave him no authority to change the component parts of the mixture specifically prescribed. But the plaintiff claims that as he was directed by the architect of the building in the letter of Feby. 25, 1890, "to follow King & Co.'s superintendent's instructions to the letter," and did follow them in mixing the plaster, the owner of the building could not complain of the variation from the specifications because the building contract contained this provision: "Should any dispute arise respecting the true construction of or meaning of the drawings or specifications, the same shall be decided by William H. Beers (the architect), and his decision shall be final and conclusive."

The assumption that by the letter, the architect intended to or did change the contract in respect to the composition of the mixture, is unwarranted. The letter commenced with the statement: "I find you are not doing your work according to your contract, nor are you following the instructions of J. B. King & Co.'s superintendent. You are skinning your work and all the browning you have put on must come off." The superintendent of King & Co. could not of his own motion change the proportions of the mixture. It does not appear that before the letter was written any disputes had arisen as to the meaning of the specifications in that respect, nor could there well have been. It is difficult to see how a letter complaining of the work as not complying with the contract could be construed as an authority to follow the instructions of the superintendent of King & Co. in respect of a matter fixed by the specifications, and a departure from which in reducing the proportion of cement would not be of advantage to the owner of the building.

The General Term disposed of the other considerations presented by the appellant's counsel, and because of his complaint that the effect of the letter of February 25, 1890, was not specifically noted, we have deemed it proper to refer to it. It furnishes no reason for reversing the conclusions of the courts below that the plaintiff failed to perform his contract.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JOSHUA C. SANDERS, Respondent, v. NATHAN DOWNS,
Appellant.

As under the provisions of the act of 1873, in relation to the collection of taxes in the county of Suffolk (Chap. 620, Laws of 1873), the county treasurer's deed on sale of land for unpaid taxes is made conclusive evidence that the sale was regular, and presumptive evidence of the regularity of all prior proceedings, where such proceedings are, in fact, void, an action to cancel the deed, as a cloud on title, is maintainable. It is essential to the validity of every assessment for the purposes of taxation that the statute under the authority of which it is made, should be complied with in every substantial particular.

In assessing unoccupied lands in said county belonging to plaintiff, who was a non-resident of the county, the name of plaintiff was inserted in the first column of the assessment roll, under the head of non-residents, and his place of residence was written under the name in that column. In all other respects the provisions of the statute in respect to the assessment of non-resident lands were complied with. (1 R. S. 390, §§ 9, *et seq.*) In the warrant attached to the roll the collector was commanded to collect from the persons whose names are inserted in the first column, "other than such persons as are named as a part of the description of the lands of non-residents." In an action to compel the cancellation of a deed given on sale of said lands for non-payment of the taxes, *held*, that the assessment was made in such form as, at least, to leave it open to doubt whether plaintiff's name was so entered as a part of the description of the lands, or for the purpose of including him among the taxable inhabitants; that there was not a substantial compliance with the statute, and so that plaintiff was entitled to the relief sought.

(Submitted February 6, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an

order made December 13, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to perpetually enjoin defendant from entering upon and cutting and removing lumber from or in any way interfering with certain lands in the town of Riverhead, in the county of Suffolk, and that defendant be adjudged to surrender a deed of said premises issued to him by the county treasurer upon a sale thereof for taxes, and for such other and further relief as might be proper.

The facts, so far as material, are stated in the opinion.

John L. Shirley for appellant. The objection to the proceedings, on which defendant's title under the tax deed is based, is the insertion of the plaintiff's name and address in the first column of the roll, which it is asserted rendered the assessment invalid. This is untenable. (Laws of 1873, chap. 620; Laws of 1855, chap. 427; *Collins v. Long Island City*, 132 N. Y. 325.)

J. C. Sanders, respondent, in person. The assessment made by the assessors in 1882 against the *person* of the non-resident plaintiff, was without authority of law and void, and could not be the foundation of a valid tax; and the tax thereon, with which the supervisors assumed to charge the plaintiff, was also void. (2 R. S. [8th ed.] 1094, 1100, 1105; *People ex rel. v. Wemple*, 117 N. Y. 83, 84; *B. & S. L. R. R. Co., v. Suprs.*, 48 id. 99, 101; *Newman v. Suprs.*, 45 id. 676; *Whitney v. Thomas*, 23 id. 281; *People ex rel. v. Oliver*, 1 T. & C. 571; *Stewart v. Chrysler*, 100 N. Y. 378; *Hilton v. Fonda*, 86 id. 346; *N. Y. & H. R. R. Co. v. Lyon*, 16 Barb. 651.) The assessment and tax being invalid, the county treasurer had no power or authority to sell and convey plaintiff's land therefor. His deed, therefore, to the defendant, was wholly void. (*Johnson v. Elwood*, 53 N. Y. 435; *Ritter v. Worth*, 58 id. 627.) The county treasurer's deed to the defendant, though, in fact, invalid, is on its face valid, and is made by the statute, under which he sold, "conclusive evi-

dence that the sale was regular, and also presumptive evidence that all the previous proceedings were regular" (§ 9, chap. 620, Laws of 1873), and is, therefore, a cloud on plaintiff's title to his land. (*Hilton v. Fonda*, 86 N. Y. 378; *Stewart v. Chrysler*, 100 id. 378.)

O'BRIEN, J. The plaintiff in this case sought relief against a sale of his land for taxes. The defendant purchased the land at the sale and received a conveyance from the county treasurer pursuant to chapter 620 of the Laws of 1873. The form of the action was to set aside the deed as a cloud upon the plaintiff's title, and as the deed is, by the ninth section of the statute, made conclusive evidence that the sale was regular, and presumptive evidence that all prior proceedings were regular according to the provisions of the act, an equitable action will lie if the proceedings are in fact void. (*Dederer v. Voorhies*, 81 N. Y. 156; *Guest v. City of Brooklyn*, 69 id. 506; *Clark v. Davenport*, 95 id. 477.)

The assessment by the town assessors, which is the foundation of all the proceedings, was made in 1882, and the only question is whether that was valid to confer jurisdiction upon the board of supervisors to levy the tax upon which the sale was made. There is no dispute with respect to the facts and the question is purely one of law. The defendant was not a resident of the town where the lands were situated, nor of the county the authorities of which assumed to collect it. The lands, therefore, could be charged only under the provisions of the statute for the assessment of the lands of non-residents. They were unoccupied, and while the lands were taxable, no one could be subjected to a personal charge, as the assessors had no jurisdiction of the person of the owner not residing in the town. It is essential to the validity of every assessment for the purposes of taxation that the statute, under the authority of which it is made, is complied with in every substantial particular. The only warrant for the imposition of a tax or burden upon the citizen or his property without his consent, must be found in some positive law, and it cannot be

enforced unless imposed in the manner pointed out by the statute. The duties and powers of assessors in making up the assessment roll of the town, which is to be the basis of taxation, are clearly pointed out by statute and must be followed. (2 R. S. [8th ed.] p. 1097.) They have jurisdiction of both the person and the property of every resident of the town, and in such cases the entry of the name in the first column of the roll, in legal effect, signifies that the person and the property have been charged. They have also jurisdiction of the real property within their town of non-residents, but in such cases the statute forbids the insertion of the name of the owner in the first column among the taxable inhabitants of the town for the reason that the tax does not constitute a personal charge. The statute requires that a description of the lands be entered in the second column and the value in the next, and assessments against non-residents must be separated from the other assessments, though in the same roll. (§§ 12, 13.). All these provisions of the statute were complied with by the assessors, in making the assessment in question, except that the name of the plaintiff has been inserted in the first column of the roll as the owner of the land that was assessed and has been sold. True, his name appears under the head of non-residents, and his place of residence is written under the name in the first column, which plainly shows that he resided in another county. The assessors doubtless intended to assess the plaintiff's lands only, but the question is whether they have not, in fact, subjected him to a personal charge, and if they have, the assessment is void. We have not overlooked the fact that in the warrant delivered by the supervisors to the town collector of taxes, they have commanded him to collect the tax from the persons whose names are inserted in the first column of the roll by distress and sale, "*other than such persons as are named as a part of the description of the lands of non-residents described therein.*" There certainly can be no objection to the insertion of the name of the non-resident owner of lands in the second column for the purpose of describing or identifying the lands, and in many cases that may be necessary.

But the difficulty with this assessment is that it was made in such form as to leave it open to doubt, at least, whether the plaintiff's name is in the first column as a part of the description of the land, or for the purpose of including him among the taxable inhabitants. Had the name been inserted in the second column, with the description, the assessment would, no doubt, be entirely valid. But to hold that the assessment, as actually made, is a substantial compliance with the statute, we would be obliged to rest the proposition upon the uncertain and somewhat arbitrary inference that the name in the first column is part of the description of the land. The case is, doubtless, what may be termed a border one, and the deviation from the express directions of the statute providing for the manner of imposing taxes in such cases may appear to be slight, but the judgment below is sustained by the decisions of this court in cases that differ in no important element of fact from this. (*Stewart v. Cryslor*, 100 N. Y. 378; *People v. Hagadorn*, 104 id. 516.) Any construction of the statute which would in any degree encourage erroneous, lax or careless methods of making up the assessment roll, would disturb the security with which the law guards private rights, and at the same time prove detrimental to public interests. If it was possible by any fine distinction to take this case out of the general rule applicable to assessments of this character, it would not be desirable to weaken or qualify by any such exception the safeguards which the legislature and the courts have erected against the invasion of property rights otherwise than in strict compliance with law.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

EMMA DUNCKEL, Respondent, v. WILLIAM DUNCKEL,
Appellant.

While it is one of the pre-requisites to the specific performance of an alleged parol agreement for the purchase and sale of land that the agreement shall be clearly proved and certain as to its terms, this rule is to be observed and enforced in the courts below which deal with the facts, and when such an agreement has been there found upon conflicting evidence, and is certain in its terms as found, it must be taken as clearly established within the rule, and the findings are conclusive here. The granting of relief by way of specific performance of such a contract is largely in the discretion of an equity court, and where it is granted without violating any fixed rule of equity, the discretion is not reviewable here.

While, as a general rule, mere payment of the purchase price, under such a contract, is not sufficient to authorize specific performance, where possession has also been taken by the purchaser, the contract will be specifically enforced, and to take the case out of this rule the circumstances must be peculiar and exceptional.

In an action to compel specific performance of such a contract these facts were found in substance: During the lifetime of J., plaintiff's husband, who was defendant's son, defendant purchased the premises in question as a home for J., with the promise that he would convey the same to J. or some one of his family without the payment of anything therefor. Relying upon this agreement, J. made and paid for permanent improvements to the amount of \$2,800, with defendant's knowledge. After the death of J. defendant agreed that if plaintiff would pay certain notes of J., on which defendant was liable as indorser, he would give her a lease of the premises for life, or pay what J. "had put in the place." In reliance upon this agreement plaintiff paid said notes, and in so doing paid more than she was obliged to pay as executrix of her husband's will. It appeared that said agreement was made before the probate of the will, and when both parties supposed his estate to be insufficient to pay his debts. Plaintiff thereupon had the will probated, and qualified as executrix. She surrendered to defendant the notes when paid, and for three years remained in possession of the premises under the agreement. *Held*, that a judgment requiring defendant to execute to plaintiff a lease for life was proper.

The case was twice tried. Upon the first trial the jury, to whom was submitted the questions of fact, answered in the negative the questions as to the promise of defendant to J., and as to improvements made by the latter. These findings were adopted by the court and were not disturbed by the reversal of the judgment upon appeal. Defendant objected to the submission of said questions to the jury on the second

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158	602
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e165	505
j165	509
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f166	267
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trial and to all evidence in reference thereto. *Held*, that the verdict of the jury answering these questions in the affirmative on the second trial and the findings objected to were entirely harmless as no relief was based thereon, and they in no way entered into or affected the judgment; also, that as by the reversal the whole case was thrown open for trial of the issue as to the agreement with plaintiff, the circumstances attending the original purchase, possession and improvements made by the son were properly put in evidence.

It was objected on appeal that the judgment should have been in the alternative, requiring defendant to give the lease, or pay the \$2,800 expended by J. There was no objection in the record presenting the point and no request that the judgment should be in the alternative. It appeared by the record that plaintiff was willing to take in lieu of the lease the amount so paid, and upon the argument her counsel offered to allow an amendment of the judgment in this respect if desired by defendant. *Held*, that the objection was untenable; that it might properly be assumed that defendant assented to the form of the judgment.

(Argued February 6, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was commenced by the plaintiff to compel specific performance of an oral agreement made with her by the defendant to execute to her a life lease of certain land owned by him.

The facts, as alleged in the complaint, are as follows: The plaintiff married the defendant's son, John A. Dunckel, in 1862. In 1866 he was engaged in business in Fort Plain, and, with the approval of the defendant, he negotiated for the purchase of a dwelling house for the price of \$2,500, which the defendant agreed to pay for him. To protect the house against any misfortune in his son's business, he agreed to take the deed in his own name and hold the title for him and his family. The son was to improve the house at his own expense, and whenever it was deemed safe and proper, or desirable by his son, he was to deed the house to his son or his family, as

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the situation and circumstances at the time might require. In pursuance of this agreement the house was deeded to the defendant; his son took possession thereof, made improvements thereon to the extent of \$3,000, and continued with the plaintiff to occupy the same and to reside therein until his death in February, 1883. During the life of his son the defendant frequently promised to convey the house to his son or his family, but finally refused to do so, although he did not deny his promise. At the time of his son's death he was indebted to various persons upon promissory notes upon which the defendant was indorser. He was anxious about such indorsements and apprehensive that he might be required to pay the notes. The plaintiff was the sole beneficiary under the will of her husband, and the executrix named therein. Soon after the death of his son, and before the probate of the will, the defendant requested the plaintiff to pay the notes, and agreed with her that if she would pay and satisfy all the notes she would not be disturbed in the possession and use of the house during her life, and that he would execute to her a lease thereof for and during her life; and she thereupon promised him that she would pay the notes as soon as possible within her means. Thereafter from time to time she paid the notes, paying the last of them on the 26th day of January, 1884, the whole amount paid being \$7,122.12, and she delivered all the notes properly discharged to the defendant, who retained the same. Thereafter he refused to execute the lease to her or to recognize her right in the house, and denied the agreement he had made with her, and threatened to remove her from the house. Since the purchase of the house it had largely increased in value, and was worth between \$6,000 and \$7,000. She prayed for relief that the defendant be compelled to execute to her a deed of the house, or a lease thereof for her life, or that he pay to her the sum of \$3,000, expended by her husband in improvements upon the house. The defendant denied all the promises and agreements alleged in the complaint, and claimed judgment for the possession of the house.

This case has been twice tried. Upon the first trial the following questions were submitted to the jury :

" 1. Did defendant buy the premises with the promise and agreement that he would convey the same to John or any of John's family, at some time, without the payment of anything therefor by John or any of his family ?

" 2. Did John make and pay for permanent improvements upon said premises out of his own means, with defendant's knowledge, relying upon such agreement ?

" 3. Did the defendant, after the death of John, agree that, if the plaintiff would pay and save the defendant from paying the notes of John on which the defendant was liable, he would give the plaintiff a lease of the property for life ?

" 4. Did the plaintiff pay the notes, relying upon the agreement to give a lease for life or to give her the money John had expended for repairs ?"

The jury answered the first two questions in the negative, and the last two in the affirmative, and the court thereafter made findings of fact and law, adopting the verdict of the jury in answer to the questions submitted to them, and gave the plaintiff judgment directing the defendant to execute to her a life lease of the premises. The defendant then appealed from the judgment to the General Term, so far as the same was based upon the findings of the jury in answer to the last two questions. The General Term reversed the judgment and granted a new trial. (56 Hun, 25.) Upon the new trial the court submitted to the jury the following questions :

" 1. Did the defendant buy the premises with the promise and agreement that he would convey the same to John or any of John's family, at some time, without the payment of anything therefor by John or any of his family ?

" 2. Did John make and pay for permanent improvements upon said premises out of his own means, with defendant's knowledge, relying upon such agreement ?

" 3. If so, what amount ?

" 4. Did the defendant, after the death of John, agree that, if the plaintiff would pay and save the defendant from paying

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the notes of John on which the defendant was liable, he would give the plaintiff a lease of the property for life or that he would pay her what John put in the place?

"5. Did the plaintiff pay the notes relying upon the agreement to give a lease for life, or to give her the money John had expended for improvements?

"6. Did plaintiff pay any other or further sum on the notes executed on which defendant was liable as indorser on the faith of such agreement than she was legally bound to pay as executrix of the estate, and if so, what sum or about what sum?"

The jury answered all the questions in the affirmative, and found in answer to the third question \$2,800, and in answer to the sixth question, "Yes, about \$375."

The court subsequently made findings of fact and law, adopting the verdict of the jury in answer to the questions submitted to them, and ordered judgment against the defendant requiring him to give the plaintiff a lease of the premises for life. The defendant appealed from the judgment to the General Term and then to this court.

Z. S. Westbrook for appellant. The alleged agreement to give a lease to plaintiff for her life was made without consideration. (*Wheelwright v. Rhoades*, 28 Hun, 57.) An agreement to pay or compensate one for discharging a legal or equitable duty is without consideration and void. (*Crosby v. Wood*, 6 N. Y. 369; *Heaps v. Dunham*, 95 Ill. 584; *Smith v. Jones*, 2 Saund. 135; *Cabot v. Haskins*, 3 Pick. 83; *Ayer v. C. R., etc., Co.*, 52 Iowa, 478.) To enforce specific performance the contract must be clearly proved, and it must be equitable and reasonable and fair in every particular. (*Seymour v. Delaney*, 6 Johns. Ch. 224; *Matthews v. Terwilliger*, 3 Barb. 55; *Miles v. Furnace Co.*, 125 N. Y. 294; *Gale v. Archer*, 42 Barb. 320; *Burling v. King*, 2 T. & C. 545.) The alleged agreement to give a lease being oral the court had no right, under the settled rules of law, to decree its enforcement. (Taylor's Landl. & Ten. [8th ed.] § 51; 3 Pars. on

Cont. [5th ed.] 393, 394; Story's Eq. Juris. §§ 760, 761; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wiseman v. Luck-singer*, 84 id. 31; *Crouse v. Frothingham*, 97 id. 105; Fry on Spec. Perf. § 387; *Sombreton v. L., etc., Co.*, 51 Ga. 76; *Bowen v. Warner*, 1 Pinney, 600; *Lincoln v. Wright*, 4 De G. & J. 16; *Wheeler v. Reynolds*, 66 N. Y. 231; *Miller v. Ball*, 64 id. 292; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Lord v. Underdunck*, 1 Sandf. Ch. 46.) An adequate remedy at law is a defense to an equitable suit. (*Pennsylvania v. D. & H. C. Co.*, 31 N. Y. 98.) The court erred in permitting plaintiff to try the question as to her claim for a deed, and it was error to receive the evidence on that claim. (*Goodsell v. W. U. T. Co.*, 109 N. Y. 148; *Genet v. Davenport*, 60 id. 194; *Griffin v. L. I. R. R. Co.*, 102 id. 452; *Murphy v. Spaulding*, 46 id. 559.) The court clearly erred in allowing costs to plaintiff. (*Law v. McDonnell*, 9 Hun, 23; *Couch v. Millard*, 41 id. 212; *Outwater v. Moore*, 124 N. Y. 68; *Newell, etc., v. Maxlow*, 51 Hun, 453; *Hudson v. Guttenburg*, 9 Abb. [N. C.] 415; *Coon v. Diefendorf*, 8 N. Y. Civ. Pro. Rep. 293; *Fish v. Forrance*, 5 How. Pr. 317; *Sands v. Sands*, 6 id. 453.) The judgment, in any event, should have adjudged that plaintiff was not entitled to a deed of the premises or to the amount expended by John A. in improvements. (*Outwater v. Moore*, 124 N. Y. 66.)

E. Countryman for respondent. Upon the facts found at the Circuit, the judgment was right in enforcing performance of the defendant's parol promise to give the plaintiff a lease for her life of the real estate in question. (*Dygert v. Remerschuyder*, 32 N. Y. 629; *Gorden v. Tucker*, 6 Munf. 1; *Smith v. Underdunck*, 1 Sandf. Ch. 579; *Davis v. Townsend*, 10 Barb. 334, 347; *Morrill v. Cooper*, 65 id. 512; *Fannin v. McMullin*, 2 Abb. [N. S.] 224; *Bigelow v. Ames*, 108 U. S. 10, 12; Willard's Eq. Juris. 284; *Kenyon v. Youlen*, 53 Hun, 591; *Shirley v. Spencer*, 9 Ill. 583; *Fitzsimmons v. Allen*, 39 id. 440; *Gregory v. Mighell*, 18 Ves. 328, 333; *Harris v. Knickerbocker*, 5 Wend. 638, 645, 646; *Lincoln v. Wright*, 4 De G.

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Opinion of the Court, per EARL, J.

& J. 16; *Emig v. Gordon*, 49 N. H. 445, 458; *Moyer Case*, 21 Hun, 67; *Dowell v. Dew*, 1 Y. & C. 345; *Nunn v. Fabian*, L. R. [1 Ch. App.] 35; *Wills v. Strodling*, 3 Ves. 378; *Shepherd v. Walker*, L. R. [20 Eq. Cas.] 659; *Spear v. Orendorf*, 26 Md. 37; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Davison v. Davison*, 13 N. J. Eq. 246; *Van Duyne v. Vreeland*, 11 id. 371; *Hill v. Gomme*, 1 Beav. 541; *Milliken Case*, 110 N. Y. 404, 412; *Miller v. McKenzie*, 95 id. 575; *Marie v. Garrison*, 83 id. 15, 26; *White v. Baxter*, 71 id. 254; *Sands v. Crooke*, 46 id. 564; *Willett's Case*, 45 id. 45; *L'Amoureux v. Gould*, 7 id. 349; *Freeman Case*, 43 id. 34, 39; *Coles v. Pilkington*, L. R. [19 Eq. Cas.] 174; *Homer v. Sidway*, 124 N. Y. 539, 545; *Wales v. Stout*, 115 id. 638-641; *Wyckoff v. De Graaf*, 98 id. 134, 137, 138; *Sanders v. Gillespie*, 59 id. 250.) If, however, it should be held for any reason that the promise to execute a life lease cannot be enforced, then the defendant is liable upon his alternative promise to pay for the improvements. (*State v. Worthington*, 7 Ohio, 171; Bishop on Cont. § 606; 2 Pars. on Cont. [6th ed.] 651, 657; Pom. on Spec. Perf. §§ 298-302; Fry on Spec. Perf. [3d ed.] §§ 990-992, 995, 996; *Stevens v. Webb*, 7 Car. & P. 61; *De Costa v. Davis*, 1 Bos. & W. 242; *Wigley v. Blackwell*, Cro. Eliz. 780; *Simmons v. Sicayne*, 1 Taunt. 549; *Drake v. White*, 117 Mass. 10, 13; *Studholmes v. Mandell*, 1 Ld. Raym. 279; 1 Salk. 176.) The costs of the action were clearly in the discretion of the court. The jury found all the issues of fact in favor of the plaintiff, and the court sustained the verdict on all the issues. (*House v. Eisenlord*, 30 Hun, 90.)

EARL, J. We are concluded by the finding of the court below that the defendant made the agreement to give the life lease alleged by the plaintiff. Whatever doubt existed as to that agreement has been cleared up by the verdict of the jury and the findings of the trial court.

One of the prerequisites to the specific performance of a parol agreement for the purchase and sale of land is that the agreement should be clearly proved and certain as to its terms.

But that is a rule to be observed and enforced in the equity courts which deal with the facts. When the agreement has there been found upon conflicting evidence, and is certain in its terms as found, it must be taken here as clearly established within the rule, and what was before uncertain has become certain.

There is a further rule that the specific performance of contracts rests largely in the discretion of the equity courts—not wholly, but in a discretion to be governed by rules which have become established for the guidance of such courts. That, again, is a rule to be generally administered in the equity courts. So far as they exercise their discretion, violating no fixed rules of equity, such discretion is not reviewable here.

We have, therefore, only to determine now whether there was such part performance of the agreement found below as to take it out of the Statute of Frauds, and whether any errors were committed upon the trial affecting the judgment rendered.

We think there was such an agreement partly performed as ought to be enforced. We must look at the situation as it existed when the agreement was made. At that time both parties supposed the estate of John A. Dunkel would prove insufficient to pay his debts. The defendant was fearful of his responsibility on account of his indorsements upon his son's notes, and wished to be relieved from all anxiety about them, and he proposed to the plaintiff that if she would pay those notes and save him harmless from his indorsements thereon he would give her the life lease, and she accepted the proposal and promised to pay the notes. It was then uncertain how much she would have to pay, and she took the risk as to the amount. The will of her husband had not then been proved, and she was under no obligation to take upon herself the burden of administering upon an estate then supposed to be insolvent. Now, what did she do in pursuance of the agreement? She had the will probated, and qualified as executrix thereof. She administered upon the estate and converted the

assets into money. She speedily paid all the notes, using for that purpose some of her own means. She fully protected the defendant against any liability on account of his indorsements, and she surrendered the notes discharged to him, and she remained in possession of the house under the agreement. It is thus seen that the amount of her own money paid upon the notes was not the only consideration moving from her for the lease to be given. There was also the risk and labor and the protection given to the defendant. If she should now fail to obtain the lease from the defendant she could not recover back from them any of the money paid to the holders of the notes. The defendant has not offered to pay back any of it, and if she should attempt to enforce payment from him she would have the burden of establishing the disputed agreement, while he held the discharged notes, the most conclusive proof of the payments by her and the amounts thereof. To all this must be superadded the fact that for nearly three years she had the undisputed possession of the premises under the agreement. We think these facts are sufficient to authorize the specific performance of the agreement, and we know of no authorities holding that under such circumstances specific performance should be refused. The authorities upon this subject are very numerous, and it would not be useful now to cite or comment upon them. Many of them will be found in the learned briefs submitted to us upon the argument of this case. We think it is a general rule to be gathered from the authorities that mere payment of the purchase price of land is not sufficient to authorize the specific performance of the contract of sale unless the peculiar circumstances of the case be such that an action at law to recover back the money paid would not give the purchaser an adequate remedy. But it is also a general rule that when the consideration has been paid and possession under the contract of sale has been taken, the contract will be specifically enforced, and to take the case out of this rule the circumstances must be peculiar and exceptional. This general rule is applicable to this case.

Upon the first trial of this action the jury answered in the negative the first two questions submitted to them in reference to the promise of the defendant that he would convey the premises to his son or his family, and in reference to the improvements to be made on the premises by his son. The findings of the jury in answer to those questions were adopted by the court and were not disturbed by the decision upon the first appeal. The defendant objected to the submission of those questions again to the jury upon the second trial, and to all evidence in reference to them, and his counsel now claims that there was error in overruling those objections. The verdict of the jury answering those questions in the affirmative upon the second trial, and the findings of the court based thereon, were, as findings, entirely harmless, because no relief whatever was based upon them, and they in no way entered into or affected the judgment. But upon the first appeal to the General Term the judgment was reversed as to the agreement made by the defendant with the plaintiff subsequently to the death of her husband that he would give her the life lease, and the whole case was thrown open for the trial of the issue as to that agreement, and the introduction of any evidence bearing thereon. Hence, the situation and value of the premises, the circumstances attending their purchase and subsequent possession, the improvements made thereon by the son, and the circumstances under which they were made, and the relation of all the parties to the premises were properly put in evidence as bearing upon the issue upon trial and the general equities of the case, and particularly to show that it would not be inequitable to compel the defendant to perform his agreement with the plaintiff. A careful scrutiny of all the evidence satisfies us that no harmful or embarrassing evidence was erroneously received against the defendant.

The further objection is made that the judgment should have been in the alternative, requiring the defendant to give the lease or pay the \$2,800 expended by plaintiff's husband upon the premises for improvements thereon. The answer to this objection is that there is no exception in the record which

presents this point for our consideration. It does not appear that the defendant requested that the judgment should be in the alternative, and for aught that appears he may have assented to the form of the judgment. This is certainly a permissible view to take of the record, and we are the more willing to take it because the record shows that the plaintiff was willing to take in lieu of the lease what her husband had paid for improvements, and even upon the argument of this case her counsel stated that she was now willing to take the \$2,800; and his offer that the judgment might be amended in that respect if more acceptable to the defendant met with no response from his counsel.

Our conclusion, therefore, is that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN J. RUSSELL, as Administrator, etc., Appellant, v. LAURA S. McCALL, as Executrix, etc., et al., Respondents.

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While, upon the death of one of two co-partners, the successor has the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and to dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief.

Where the surviving partner has thus misappropriated the assets and an equitable action has been brought against him by the personal representatives of the estate of the deceased partner, and a judgment obtained therein for an accounting and payment of the amount found due the estate, this, unless the amount so found due is paid, is not a bar to an action against others who, by intermeddling with the assets and sharing in the misappropriation, have rendered themselves liable therefor as trustees *de son tort*. Until satisfaction of the judgment it gives the surviving partner no greater rights over the assets than he had before its rendition.

Fowler v. Bowery Sav. Bank (113 N. Y. 450); *Terry v. Munger* (121 id. 161), distinguished.

Each one of the several wrongdoers is severally liable for the full amount of the misappropriation.

Where, therefore, after judgment against the surviving partner alone, a joint action was brought against him and other wrongdoers who had participated in the misappropriation of the firm assets, *held*, that the former judgment was a bar as to him, but was no defense as to those not previously sued.

In the subsequent action it was decided that the judgment against the surviving partner was conclusive against the plaintiff as to the amount and value of the assets, but was no evidence against the defendants other than said partner. *Held*, no error.

In the action against the surviving partner it appeared that there was a disputed claim against the firm in favor of one who had shared in the misappropriation of the firm assets, and the amount thereof was required to be deposited in a trust company, to pay such claim if it was established, but no such deposit was in fact made. *Held*, in the subsequent action against the other wrongdoers, that no one of the defendants was entitled to be credited with the amount so ordered to be deposited; that the fact that one of the defendants claimed to be a creditor of the old firm was not a defense, as he could not, by his illegal interference with the assets, pay his claim, nor had he the right to take possession of the property for that purpose.

The deceased partner died in 1880. In that year the action against the surviving partner was commenced. The litigation was not concluded until the latter part of the year 1886. Early in the year 1888 the action against all the wrongdoers was commenced. *Held*, that a refusal to dismiss the complaint on the ground of inexcusable *laches* was proper; that the record disclosed reasonable cause for the delay.

A receiver was appointed in the first action, who sold the remaining firm assets, and by order of the court deposited the proceeds, subject to further directions. In the second action the trial court, instead of rendering an interlocutory judgment and sending it to a referee to inquire as to how much was left of the sum so deposited, over and above expenses, took the evidence upon that point and directed final judgment. *Held*, no error.

Russell v. McCall (68 Hun, 44), reversed.

(Argued February 7, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 17, 1893, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

For some time prior to Feb. 21, 1880, one Schamu M.

Moschcowitz and Miss Mary A. Russell were partners with equal interest in the dress-making business in New York city, under the firm name of Moschcowitz & Russell, having a place of business in Fifth avenue.

On the day mentioned Miss Russell died in New York and left a will, which was subsequently duly proved, in which she appointed her sister, Elizabeth L. Russell, executrix thereof, who subsequently duly qualified.

At the time of this death the partnership had large assets, consisting of stock in trade, accounts and an unexpired term in the real property in Fifth avenue, where the business had been carried on. The surviving partner took possession of the firm assets and continued the business until May 1, 1880, at which time it was ascertained by him and James McCall that the assets of the late firm amounted to a little over \$51,000 above all liabilities, and all the liabilities of the late firm were paid and discharged, except a claim made against it by one Herman Moschcowitz, a brother of Schamu, which claim was not admitted, but provision for it was made in the judgment hereafter referred to. In May, 1880, Schamu Moschcowitz and James McCall formed a partnership, under the name of Moschcowitz & Russell, for carrying on the same kind of business at the same place as the late firm. The capital upon which this new firm carried on the business consisted solely of the assets and good will of the late firm. Of this fact James McCall had at all times full knowledge. This capital was used by the new firm for their own purposes, and no part was paid over to the representative of the deceased partner.

This new firm continued business until Jan., 1881, when a new partner was added in the person of the brother Herman, and the firm name was changed to that of Moschcowitz Brothers. The sole capital of this firm consisted of the assets, proceeds of assets and good will of the old firm of Moschcowitz & Russell, of which Miss Russell was a partner when she died. Of this fact all members of the firm had full knowledge, and the two firms appropriated to their own use all the

surplus assets belonging to the old original firm. In Feb., 1882, McCall commenced an action to wind up the affairs of the partnership of Moschcowitz Brothers, and on March 10, 1882, Schamu M. Moschcowitz was appointed receiver of all its assets. The case proceeded to judgment declaring the partnership, and ordering a reference to take an account, etc. The receiver sold assets and realized some \$7,000, which were, by order, deposited in a trust company, subject to further directions.

In Oct., 1880, the executrix of the late partner commenced an action against the survivor for an accounting, and in the complaint it was alleged that the defendant had then received sufficient assets to have paid off all its debts and have closed up the business, but that he had neglected to do so, and had continued in possession of the real estate, and carried on the same kind of business theretofore conducted in the lifetime of Miss Russell, and that he used the assets and property of the late firm in his business, and made no effort to sell or dispose of the same, except in the course of his business, and that he had then in his possession, unsold and undisposed of, the greater part of the assets and property of the late firm, which were becoming constantly less and less valuable. The plaintiff asked for an accounting and a judgment in her favor for the amount that might be found due, and that a receiver might be appointed, and the defendant restrained from continuing the business and from using the old firm name. Issue was joined and the case tried, and upon the accounting the amount of the plaintiff's interest as executrix in the assets of the late firm was determined, and a judgment entered personally against the survivor, and a proviso made therein for his paying to a trust company an amount sufficient to pay any claim that Herman Moschcowitz might establish against the late firm. Judgment for the balance of some \$14,000 was given, but on appeal to the General Term that balance was reduced to a small sum of between three and four hundred dollars. This judgment as modified has never been satisfied, nor has the surviving partner ever complied with its terms by making the

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Statement of case.

deposit provided for thereby. The judgment as modified by the General Term was entered in Oct., 1886. In 1888 the executrix of the deceased partner commenced this action, and, having since died, the plaintiff has been appointed administrator of the estate of the deceased partner, with the will annexed, and as such has been substituted as plaintiff. The action is against the survivor, Schamu M. Moschcowitz, both individually and as receiver of the firm of Moschcowitz Brothers, also against Herman Moschcowitz, and Laura S. McCall as executrix of the will, etc., of James McCall, deceased, the partner in the two firms already mentioned.

The plaintiff in the complaint alleged, upon information and belief, the facts above detailed as to the formation of the firms and their use of the assets of the late firm.

A claim was also set up therein of a lien in favor of the plaintiff, upon the amount of money paid into the trust company by the receiver of Moschcowitz Brothers, after expenses of its administration, which claim of lien was founded upon the allegation that the money represented the proceeds to that extent of the assets of the old firm. Judgment against all the defendants was asked for the amount of the judgment against Schamu M. Moschcowitz already recovered, and also for an injunction restraining defendants from interfering with the fund on deposit, or the other assets.

The Moschcowitz Brothers answered, and, among other things, alleged the commencement of the action against Schamu and the judgment therein, and claimed that the plaintiff was not entitled to another judgment against the defendants, or any of them, for the amount of assets that came into their hands, or for any other sum whatever. Laura McCall answered and denied the allegations of the complaint, set up the defense that the assets of the firm had been disposed of by the survivor under the permission of the executrix of the deceased partner, and that for her interest in the assets she had recovered a judgment against the survivor, and that the assets had been lawfully disposed of by him. Also, that all the moneys, assets, etc., claimed to be recovered in this action, were in the

custody of the Court of Common Pleas, and that the defendant was entitled to the whole of them. It also appears that, at the time of the death of Miss Russell, James McCall was a creditor of the firm to the amount of some \$18,000. That sum was paid during the subsequent time by reason of transactions of McCall with the succeeding firms, by which it is claimed that he became their creditor to the extent of over twenty thousand dollars. Schamu M. Moschcowitz always denied that McCall was ever a partner in either firm, although the fact was otherwise found in the suit which McCall instituted to dissolve the partnership.

Upon the trial it was found, in addition to the foregoing facts, that the estate of McCall was in no event liable to Herman Moschcowitz by reason of any claim he might have against the old firm in which Miss Russell was a partner. Judgment was ordered in favor of plaintiff and against defendant McCall for the amount of the share of the assets of the old firm due plaintiff as administrator, with interest and costs. No further personal judgment was given against Schamu M. Moschcowitz and none was given against Herman Moschcowitz. No one but the defendant McCall appealed from the judgment. Upon her appeal the General Term of the Supreme Court reversed the judgment upon the facts as well as upon the law and granted a new trial, and the plaintiff has appealed from that order, giving the usual stipulation for judgment absolute against him in case the order be affirmed.

Peter A. Hendrick for appellant. The executrix of *Mary A. Russell*, deceased, apart from the question of her knowledge, did not, by the commencement of her action for an accounting against *Schamu M. Moschcowitz*, the surviving partner of the firm of *Moschcowitz & Russell*, thereby elect to look to such surviving partner alone, nor by the money judgment recovered therein is she estopped from maintaining an action to recover the value of the surplus assets of such firm, which the said *McCall* and *Moschcowitz* had jointly and wrongfully appropriated to their own use. (*Williams v. Whedon*,

109 N. Y. 333; *Loesvhighk v. Hatfield*, 5 Robt. 26; *Cushman v. Addison*, 52 N. Y. 628; *Fowler v. B. S. Bank*, 113 id. 450; *Lord v. Tiffany*, 98 id. 413; *Sessions v. Johnson*, 95 U. S. 347; *Lovejoy v. Murray*, 70 id. [3 Wall.] 129; *Sturtevant v. Waterbury*, 2 Hall, 449; *Drake v. Mitchell*, 3 East, 285.) The doctrine of election of remedies has no application to the facts existing in this case. (*Terry v. Munger*, 121 N. Y. 161.) While the law governing the rights of partners in case of death of one vests all the property in the survivor for a specific purpose, it does not preclude the plaintiff from maintaining this action, notwithstanding the fact of the recovery of the judgment against Moschcowitz. (*Williams v. Whedon*, 109 N. Y. 238; *Knox v. Gye*, L. R. [5 Eng. & Ir. App.] 636; *Lindley on Part.* 524; *Vyse v. Foster*, L. R. [7 H. L. Cas.] 318; L. R. [8 Ch. App.] 323; *Travis v. Milne*, 9 Hare, 141.) This action is brought against Schamu M. Moschcowitz individually and as receiver of the firm of Moschcowitz Brothers, Herman Moschcowitz and Laura S. McCall, executrix of James McCall, deceased, to reach a fund in the hands of such receiver, alleged to be the proceeds of the sale of property belonging to the original firm of Moschcowitz & Russell, and to have the claim of the representative of the deceased partner declared a lien thereon, and for such other and further relief as to which such representative might be entitled. To this form of action all the above named were proper parties defendant. (*Wilkinson v. Henderson*, 1 Myl. & K. 582; *McDonald v. Richardson*, 1 Giff. 81; 1 *Lindley on Part.* 199; *Pope v. Cole*, 55 N. Y. 124; *Richter v. Poppenhausen*, 42 id. 373; *F. N. Bank v. Morgan*, 73 id. 593; *Ferris v. Van Vechten*, 73 id. 113; *Brewer v. Gillett*, 115 id. 10.) To invoke the aid of the doctrine of election of remedies, knowledge by the party against whom the election is claimed must be proved. (*Conrow v. Little*, 115 N. Y. 387; *E. C. F. Co. v. Hersel*, 103 id. 25; *Hays v. Meilas*, 104 id. 602; *Terry v. Munger*, 121 id. 161; *Stewart v. Moss*, 79 id. 629.) The court at Special Term did not err in taking proof of the amount of money in the receiver's hands over and

above the liabilities owing by him. (*Glening v. Stedwell*, 64 N. Y. 120; *Rice v. Ehile*, 55 id. 218; *McCulloch v. Dobson*, 133 id. 114; *Coffin v. Lester*, 36 Hun, 347.) The evidence sustained the findings of the Special Term, and did not warrant the General Term in reversing the judgment upon questions of fact. (*Baird v. Mayor, etc.*, 96 N. Y. 567; *Devlin v. G. S. Bank*, 125 id. 756; *Travis v. Travis*, 122 id. 449; *Nostrand v. Knight*, 123 id. 614; *Aldridge v. Aldridge*, 120 id. 614; *Burnap v. N. Bank*, 96 id. 125; *Ostrander v. Hart*, 130 id. 406; *Gilman v. Prentice*, 132 id. 488.)

George Hoadly, Barclay E. V. McCarty and Henry L. Scheuerman for respondent. The representative of the deceased partner, by prosecuting an action for her decedent's share of the partnership assets to judgment against the survivor Moschcowitz alone, is barred from suing the surviving partner again, joining McCall with him upon the same cause of action. (*Harrington v. Keteltas*, 92 N. Y. 40; *Loomis v. Armstrong*, 63 Mich. 355, 361; *Williams v. Whelan*, 109 N. Y. 333; *Preston v. Fitch*, 137 id. 41; *Ferris v. Van Vechten*, 73 id. 113; *Barker v. Barker*, 14 Wis. 142; *Mayor v. Le Clair*, 11 Wall. 217; *Crook v. F. N. Bank*, 83 Wis. 31; *A. Co. v. May*, 82 Ga. 646; *Terry v. Munger*, 121 N. Y. 161; *Scarf v. Jardine*, L. R. [7 App. Cas.] 345; *Conron v. Little*, 115 N. Y. 387; *Moller v. Tuska*, 87 id. 166; *Rodermund v. Clark*, 46 id. 354; *Morris v. Rexford*, 18 id. 552; *Bank of Beloit v. Beale*, 34 id. 473.) The plaintiff's right of action herein is merged in the judgment recovered against Moschcowitz, the survivor. (1 Bates on Part. § 535; *Robertson v. Smith*, 18 Johns. 459; *Pierce v. Kearney*, 5 Hill, 82; *Olmstead v. Webster*, 8 N. Y. 413; *Suydam v. Barber*, 18 id. 468; *Candee v. Smith*, 93 id. 349; *R. L. R. Co. v. Roach*, 97 id. 378, 382; *U. S. v. Ames*, 99 U. S. 35; Story on Bills, § 428.) The representative of a deceased partner who sues a survivor and recovers a personal judgment for the value of the interest of the decedent is estopped to deny that the assets became the survivor's, and

can make no claim against any person who took title to such assets under him. (*Preston v. Fitch*, 137 N. Y. 41; *Egberts v. Wood*, 3 Paige, 517; *Knox v. Gye*, L. R. [5 Eng. & Ir. App.] 656.) The plaintiff being fully cognizant of the uses made of the partnership assets by Moschcowitz and McCall at and after the time of their appropriation, and choosing to remain inactive and non-assertive of her claims for eight years, is barred from recovery by *laches* and acquiescence. (*Calhoun v. Millard*, 121 N. Y. 69; *Sullivan v. P. & K. R. R. Co.*, 94 U. S. 806; *Badger v. Badger*, 2 Wall. 87; *Brown v. County of Buena Vista*, 95 U. S. 157; *Godden v. Kimmell*, 99 id. 201; *Coddington v. Railroad Co.*, 103 id. 409; *B. & P. R. R. Co. v. N. Y. & N. E. R. R. Co.*, 13 R. I. 260, 266; High on Receivers, § 14; Pom. Eq. Juris. §§ 418, 815, 817.) It having been adjudged between the representative of the deceased partner and the survivor that the decedent's share of the partnership assets amounted to \$435.49, the representative of the decedent can recover no larger sum than the amount of her determined interest. (Pom. Eq. Juris. § 1243; *Williams v. Whedon*, 109 N. Y. 333; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Murray v. Fox*, 39 Hun, 108; 104 N. Y. 382; *Skidmore v. Collier*, 8 Hun, 50; *Wickliffe v. Eve*, 17 How. Pr. 467.) The judgment recovered by the plaintiff against Schamu M. Moschcowitz has no binding effect upon McCall's representative to determine the value of the assets that came into McCall's hands. (Whart. on Ev. § 760; *Dolbeer v. Stout*, 139 N. Y. 486; *Bissell v. Kellogg*, 65 id. 432; *McMahon v. Macy*, 51 id. 155; *Stephens v. Fox*, 83 id. 313; *Orthwein v. Thomas*, 127 Ill. 554; *Gilman v. Healy*, 46 Hun, 310; *Fontaine v. Hudson*, 93 Mo. 62.) The recovery at Special Term cannot be upheld. (*Ferris v. Van Vechten*, 73 N. Y. 113; *Cuvin v. Gleason*, 105 id. 256; *Holmes v. Gilman*, 138 id. 369; Bates on Part. § 740.) The learned trial justice erred in making the additional findings of fact and conclusions of law, based on the additional testimony erroneously taken at the hearing regarding the settlement of the judgment. (*Gormerly v. McGlynn*, 84 N. Y. 284; *Fairman v. Brush*, 60

Hun, 442; *In re Bayer*, 54 id. 189, 191; *Berdell v. Berdell*, 33 id. 535, 536; *F. N. Bank v. Levy*, 41 id. 461; *Palmer v. P. Ins. Co.*, 22 id. 224; *Moore v. Townshend*, 102 N. Y. 387, 392.) If it appears that the Special Term committed any error to which an exception was taken to the detriment of the respondent, this order granting a new trial must be sustained; it is not to be reversed except upon the showing that the Special Term was free from all error. (*Reed v. McConnell*, 133 N. Y. 425.)

PECKHAM, J. The judgment which the plaintiff obtained in this action at Special Term is here assailed by the counsel for the defendant, Mrs. McCall, upon several grounds that will be alluded to in their order.

First. The defendant claims that the executrix of Miss Russell, by commencing her action against the surviving partner to recover the decedent's share of the partnership assets and in prosecuting the same to judgment, is barred from suing the surviving partner again, and joining with him Mrs. McCall upon the same cause of action. It is now asserted by counsel for defendant McCall that when the other action was commenced the executrix knew all the facts connecting McCall with the misuse or misappropriation of the assets of the partnership. The Special Term did not find that she was ignorant, and on the other hand it refused the defendant's request to find that she had at that time full knowledge of these facts. The General Term said that it could not be found, in view of the plaintiff's allegations in the suit against the surviving partner, that she was ignorant of his misappropriation of the assets when she commenced her suit against him and yet (the court says) in the face of such allegations in her complaint the plaintiff took a personal judgment against the survivor for the value of her share therein, the result of which the court holds was to bar the plaintiff from impeaching the title of any one who came into possession of the assets through the surviving partner. Whichever way the fact might be determined we think it is immaterial in this

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case, and for the further discussion of this point we will assume full knowledge on the part of the executrix of all the facts at the time she commenced her action against the survivor. In that case we think there was no election of inconsistent remedies such as should bar this action.

Upon the death of Miss Russell, the surviving partner, Moscheowitz, had certain powers, rights and obligations granted to and placed upon him by reason of such death. He had the legal title to the assets and he held them as the legal owner, and not as trustee, in the strict sense of that term. In equity, however, he was to be regarded to some extent as a trustee, and his duty was to pay the debts and dispose of the assets of the partnership for the benefit of himself and the estate of the deceased partner. (*Case v. Abeel*, 1 Pai. 393; *Williams v. Whedon*, 109 N. Y. 333; *Preston v. Fitch*, 137 id. 41, 56.) The position is somewhat anomalous, not exactly and wholly a trustee, and yet not a full owner of the assets which he takes or retains possession of by reason of survivorship. The duties spoken of he owes the estate of the deceased partner, and when, instead of gathering in the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates the same and converts them to his own use and that of others with him, he is so far guilty of a breach of trust that a court of equity will, when called upon, intervene and give appropriate relief.

This was the object of the first action. The court was asked to decree an accounting, and as a ground for the request it was alleged that the defendant was violating his duty, converting the assets to his own use in his own business and failing to apply them to the payment of the debts of the partnership. Judgment was asked for the amount which might be found due upon such accounting. In all this there was nothing inconsistent with the cause of action set forth in the complaint now under review. Even in equitable actions of account, it frequently, if not generally, results that a pure and simple money judgment will be entered against the defendant. The inquiry by means of an account is proceeded with and the result being

determined, if it show an amount due the plaintiff, a judgment therefor may properly be entered. (1 Pom. Eq. Jur., third clause, § 110; Id. § 140; 3 Id. § 1421.) But this kind of a judgment is not in the least inconsistent with the right to pursue other wrongdoers who, by intermeddling with the property and assets of the estate, have rendered themselves liable as trustees *de son tort* for the wrong done. (1 Perry on Trusts, § 245; *Flockton v. Bunning*, cited in note to *Vyse v. Foster*, L. R. [8 Ch. App.] 309 at 323; Lindley on Part. 531.)

The survivor of the partnership did not become the full and absolute owner of its assets upon the entry of the personal judgment against him, nor was there any election on the part of the plaintiff by reason of that fact to look only to the one wrongdoer when there were others equally liable. If the personal judgment were paid, then indeed the plaintiff's rights and equities in the property would be changed and he would be precluded from any further claim upon it. Until satisfaction of that judgment, however, the plaintiff could not be barred from further efforts to obtain relief against other wrongdoers. Even in an action of trover for the conversion of a chattel, a judgment unsatisfied does not change the title to the property and is no bar to an action against any one of the other wrongdoers. (*Osterhout v. Roberts*, 8 Cow. 43; *Sessions v. Johnson*, 95 U. S. 347, 349.) And by subsequently suing other wrongdoers who had wrongfully interfered with the property, it is not a following of trust funds into other property in which they have been invested, within the rule on that subject as claimed by defendant's counsel and of which *Ferris v. Van Vechten* (73 N. Y. 113) is an example. There is no inconsistency in holding the trustee personally responsible, and also pursuing other wrongdoers and seeking relief against them as trustees *de son tort* by way of damages for the same wrong.

It is true that one cannot recover the purchase price of land and the land too. If one choose to hold his trustee for the amount of the price he received for trust property wrongfully sold, it may well be that the plaintiff thereby affirms the sale

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and seeks to recover the price. This is no such case. The plaintiff does not seek to hold the property which has been substituted in place of trust funds and to hold the trustee also. There has been no substitution of trust property, but the funds themselves have been converted by the survivor and others to their own use, and the plaintiff asks to recover damages for that wrong. Because the survivor was proceeded against alone, and a personal judgment recovered against him which has not been satisfied, furnishes no evidence of an election of inconsistent remedies to the extent of freeing the other wrongdoers from the consequences of their wrong.

The cases cited by defendant's counsel, of which *Fowler v. Bowery Savings Bank* (113 N. Y. 450) and *Terry v. Munger* (121 id. 161) are examples, are not in point. In the former action the plaintiff, by commencing his action against the person to whom the defendant bank had paid the money, affirmed the validity of the payment and sought to recover its amount from him. After failing to recover the amount on a judgment entered against him, the plaintiff then commenced his action against the bank and sought to recover from it on the ground that the bank had never made a valid payment of its debt. We held the plaintiff had made an election to consider the payment made by the bank to the third person as a valid payment of such debt so far as the bank was concerned, and the plaintiff ratified it by commencing the suit.

In *Terry v. Munger* the owner of the property elected to treat its conversion as a sale and commenced his action accordingly. It was held he could not thereafter commence an action against others in which his cause of action was founded upon the conversion instead of the sale of the same property upon the same occasion and in the same transaction. In all the cases cited there is an element of inconsistency involved in which the plaintiff seeks to occupy with reference to the same transaction and upon the same facts, a position which is antagonistic with one already taken by him. I can see none such in this case. He took no position, proved no fact, asked for no relief in the first case which is in any way inconsistent

with the position he now assumes, unless it be said that the recovery of the personal judgment has effected this great change. For the reasons already given, I do not think it has.

The failure to have a receiver appointed in the first suit is, as it seems to me, immaterial. The point is that no absolute right to these assets, freed from any duty with regard to them, was ever transferred to the surviving partner by reason of the mere entry of this personal judgment so long as it remained unsatisfied. Nor are the other defendants absolved by any such reason from answering to the plaintiff for what would otherwise be a conceded wrong. No cause of action against them for such a wrong was waived or in any wise affected by the plaintiff's effort to recover the value of the assets which the survivor had misappropriated, or shared with others in misappropriating. It was simply a separate proceeding against one wrongdoer, and no satisfaction.

In this case the survivor has in fact never transferred the assets to others. He has simply shared with others in the misappropriation of the firm assets, and I can see no principle upon which a proceeding against one of the wrongdoers should be regarded as an election to dismiss the others from all liability arising out of the same wrong. Under these circumstances the defendant can obtain no consolation from the entry of that judgment.

Second. The defendant also objects that the plaintiff's right of action was merged in the judgment recovered against the surviving partner.

Where there is a joint indebtedness (not a joint and several) a judgment recovered against one of two or more joint debtors merges the original debt in the higher security of the judgment, and no action can thereafter be maintained against any of the other defendants, even though no satisfaction is received of the judgment against the one debtor. (*King v. Hoare*, 13 M. & W. 494; *Olmstead v. Webster*, 8 N. Y. 413; *Candee v. Smith*, 93 id. 349, 352, and cases cited; *Mason v. Eldred*, 6 Wall. 231.) But a judgment against one wrongdoer unsatisfied is not a bar to the maintenance of an action against the

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others. (*Livingston v. Bishop*, 1 Johns. 290; *Osterhout v. Roberts*, 8 Cow. 43; *Lovejoy v. Murray*, 3 Wall. 1, where Mr. Justice MILLER reviews the cases; *Sessions v. Johnson*, 95 U. S. 347, 348.) By taking judgment against the survivor the plaintiff did not make the partnership assets the absolute property of the survivor free from any duty on his part regarding them. Nor did he thereby vest in such survivor a legal right to convert those assets and apply them to his own use, or to transfer them to a mere volunteer free from all liability to the estate of the deceased partner. Until the judgment against the surviving partner was satisfied he took no further or greater right to the assets than he had before. Of course, as survivor and originally he could sell or mortgage them or otherwise dispose of them for the purpose of paying the debts and winding up the affairs of the partnership and making distribution of the surplus, but I think the entry of the judgment gave him no greater rights over the assets of the partnership than he had before. Satisfaction of the judgment was necessary for that result.

Third. The defendant also objects that even if the parties were all wrongdoers in such manner as to render them jointly and severally liable, then the judgment against Schamu M. Moschowitz, one of the wrongdoers, is a bar to an action against all of them, on the ground that pursuing one of the parties severally is an election to sever the joint liability, and it cannot be revived. Counsel cites *Sessions v. Johnson* (95 U. S. 347); *Daniel on Negotiable Instrnts.* (sec. 1296), and *Story on Bills* (sec. 428), as authority for his contention, and he urges that this is a matter which the party who has not before been sued can take advantage of, because the plaintiff has elected a different remedy which operates as a general bar to the maintenance of the action.

The principle claimed is applied in the two above-cited works upon negotiable paper to contracts of a joint and several nature, while in the case of *Sessions v. Johnson* (*supra*) the court, in deciding another matter, asserts the principle that a party who sued any one of several wrongdoers and had

judgment could not afterwards seek his remedy in a joint action against all, because the prior judgment against one was in contemplation of law an election on his part to pursue his several remedy. Where there is a joint and several contract it is held that the plaintiff may sue jointly or severally, but he cannot do both, and the pendency of one suit may be pleaded in abatement of the other. In such case there is, it is said, an election as to which character of the expressed contractual obligation the party will enforce. (*Ex parte Rolandson*, 3 P. Wms. 405; 5 Robinson's Prac. 823.) In the *P. Williams* case above cited it is stated in a note (page 405) that if three are bound jointly and severally the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally. In regard to the liabilities of joint and several tort feorsors the law is not so clear. I think there is a radical difference in principle between a joint and several obligation evidenced by an expressed contract or arising by implication from the facts proved, and a joint and several liability on the part of several tort feorsors. A joint and several obligation based on a note, bond or other written contract, or one arising out of an implied contract, is a well-known kind of obligation, and its legal meaning has come to be that each one is liable to a separate suit, or that all are liable to a joint suit, and in no other way can they be held. This is known as part of the obligation they entered into. But a joint and several liability, arising out of a particular wrong having been done the plaintiff by several wrongdoers, is not so precisely limited. Thus, Cooley says that in such case more than one and less than all may be sued. (Cooley on Torts, 133.) And in suing less than all it is not an election to take one of two remedies which the defendants have by their contract consented to give the plaintiff his choice of, but have not consented to give both. It is the pursuit of certain of the wrongdoers who are in any event liable, and if unsuccessful in obtaining satisfaction the right remains to pursue others, although in each case the defendants chosen may have been more than one and less than all the wrong-

doers, and so the remedy may have been strictly neither joint nor several, as that term is applied to cases of joint and several contractors. Hence, when, subsequent to the first action, the plaintiff commences one against all of the wrongdoers, he has not lost the right to maintain it by reason of an election to waive such a remedy, but he has lost it only as against those whom he has already sued, and he has lost it in their case only for the reason that he has no right to vex them twice for the same cause of action. The parties who have not been already sued cannot take advantage of this ground as a defense on their part. As to them the plaintiff has made no election of remedies and their liability remains unaffected.

I think the objection to maintaining the joint action ought to be held personal to the one who has already been sued and against whom judgment has already been obtained. His objection is pertinent, he has once already been proceeded against and judgment has gone against him, and he ought not to be again vexed for the same cause. I have found no case where the objection has been made and allowed in favor of a defendant who had not before been sued. I see no reason why it should be. He has not been harmed in any conceivable way, nor his interests or defenses in the least degree jeopardized.

In this case the trial resulted in a judgment against the defendant McCall only, who was not before sued. The trial court refused to give a further judgment against the survivor in the partnership. It was in effect the same as if there had been a discontinuance as against that defendant. I do not understand the defendant to question the proposition that a plaintiff can pursue the several wrongdoers separately, although while obtaining several judgments he can have but one satisfaction. So here, if he had pursued McCall alone subsequent to the judgment against the survivor, such action, so far as this point is concerned, could be maintained. The course pursued is the same as a discontinuance, and I think that would be, in effect, the same as if the action had not been brought against the party in regard to whom a discontinuance

was entered. That McCall, by taking this property and applying it, with the surviving partner, to his own uses, with knowledge of its character and without paying any consideration therefor, can be properly treated as a wrongdoer and trustee *de son tort*, and be made liable in an equitable action for his acts, is, as it seems to me, undoubted. (*Vyse v. Foster*, L. R. [8 Chy. App.] 309, 323; *Flockton v. Bunning*, note to above case, at page 323; *Perry on Trusts*, § 245; *Hooley v. Cleve*, 9 Abb. N. C. 8; *In re Jordan*, 2 Federal R. 319; 2 Pom. Eq. Jur. 1079.) Although the party sued the second time in this action did, by his answer, take the objection that no further judgment ought to be entered against him, yet as none was entered he has no further cause of complaint, and he took no appeal from the judgment that was entered herein against McCall. As to McCall, we think the judgment was a proper one, so far as this point is concerned.

Fourth. The objection that plaintiff is only entitled, in any event, to recover the balance over and above the amount which was ordered to be deposited by the court in the other action to meet the possible claim of Herman Moschcowitz, and which balance is only about \$300, cannot prevail. Herman is a party to this suit, and it has been found that in no event is the estate of McCall liable to him for any portion of his claim against the old firm, and Herman has not appealed. That amount cannot be properly deducted from the amount of McCall's liability for the value of the share of the estate of the deceased partner which came into the hands of the firm, and was converted to his use. Each one of several wrongdoers is liable for the full amount of the conversion or misappropriation. (*Atty.-Genl. v. Wilson*, 1 Cr. & Ph. 1; *Cunningham v. Pell*, 5 Pai. 607; 2 Pom. Eq. Jur., note at end of section 1081.)

By this judgment there is no danger of the defendant's estate being made liable to pay a second time. McCall's estate stands in no position as surety for any creditors of the original firm. It is found that the estate of McCall owes a certain sum to plaintiff as payment for one-half the assets of

the old firm for which the estate is liable. Whether plaintiff, as administrator, will have to pay anything by way of satisfaction of the debts of the old firm will be known hereafter when Herman endeavors to prove his claim. McCall's estate has no interest in that question, nor has it any in the question whether the individual creditors of Miss Russell, the deceased partner, will be able to obtain payment out of the assets that are to be paid over under this judgment before a creditor of the partnership will be able to do so. These various creditors will enforce what rights they have without any aid from McCall's estate as a volunteer on that subject. It is not to be assumed that any improper or undue preference will be obtained by any one after the McCall estate has made its payment to the plaintiff. A payment under this judgment will protect all the rights of the estate. And, lastly, there are no debts left excepting the claim of Herman, which is disputed.

If this judgment is paid it will satisfy the judgment against Schamu M. Moschcowitz, obtained by this plaintiff, and if that judgment should be paid, it will satisfy this one as to principal and everything but costs. There is no difficulty in providing for but one payment and a satisfaction of both judgments thereby.

Fifth. The judgment against the surviving partner was not used as evidence against the McCall defendant as to the amount or value of the assets converted. The learned judge held it was conclusive against the plaintiff, but that it was no evidence against defendant as to what the value of the property was, and he said that upon the evidence in the case outside of the judgment he thought the value was greater than had been allowed in the former suit, yet he held the defendant only liable for that amount.

Sixth. There is nothing in this case showing any following of any trust funds or any lien upon their proceeds. If there had been any such, it would in such an action have been to the benefit of the defendant by lessening the amount of a recovery against it by just the amount of the funds identified and obtained. But as to the \$7,000 deposited by the receiver

of Moschcowitz Brothers in the trust company, it appears the expenses were more than enough to eat them up and no judgment for their payment has been recovered.

Seventh. Nor is the fact that Herman Moschcowitz claims to be a creditor of the old firm while he is one of the defendants charged with this conversion of assets, an answer to the plaintiff's demand. Herman could not by his illegal interference with these assets, pay his debt, nor had he the right to take possession of the property for that purpose. When the surviving partner violated his duty and was one of the parties that converted the assets of the partnership to his own use, so that judgment was recovered against him for the amount of one-half of the assets after he had deposited in the trust company by the direction of the judgment all that was necessary to meet all the debts of the firm, his further rights as surviving partner ceased. There are no other debts. If, being insolvent, or for any other reason, he has failed to make the deposit as directed by the judgment, he did not after the judgment was entered have the right to demand from defendant McCall any portion of the money which the latter was liable to pay to plaintiff on account of his own wrong in converting the assets of the partnership in connection with the surviving partner. The only debt outstanding is the Herman Moschcowitz claim, which is disputed and which does not appear to be prosecuted as if it had much merit. And it must be upon these facts that the rights of the parties are to be adjudged.

Eighth. The defendant also contends that the plaintiff's complaint should have been dismissed on the ground of inexcusable *laches* in bringing the action. The litigation arising out of the attempt to make the surviving partner responsible for his misconduct was not concluded until the entry of the modified judgment of the General Term late in the year 1886, and a short time thereafter the plaintiff probably discovered the ineffectual character of his attempt at redress in that direction. Early in the year 1888 this action was commenced. We think the record discloses reasonable cause for the delay in bringing

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this action, and the plaintiff is not within the principle regarding stale claims invoked by defendant.

Ninth. We think the trial judge committed no error in practice when, under the circumstances, instead of entering an interlocutory judgment and sending it to a referee to inquire whether there was anything left of the \$7,000 paid by the receiver over and above the expenses consequent upon its collection, etc., he took the evidence upon that point himself and ordered final judgment in accordance therewith to be entered.

These are the principal grounds urged by respondent for an affirmance of the order of the General Term. It is unnecessary to more fully mention the other points, and it is enough to say we do not think them sufficient to reverse the Special Term judgment.

We have given this case and the very able argument of the counsel for the defendant all the consideration possible, but for the reasons stated we are unable to agree with the conclusion arrived at by the General Term. We think on the contrary the learned judge at Special Term arrived at the correct result, and, therefore, the order of the General Term must be reversed and the judgment of Special Term affirmed, with costs in the General Term and in this court to the appellant here.

All concur.

Ordered accordingly.

BELLE I. WOODRICK, Appellant, v. WILLIAM WOODRICK,
Respondent.

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143	240

In an action for a limited divorce brought by the wife on the ground of alleged cruel and inhuman treatment, defendant in his answer denied the charges of the complaint, set up by way of counterclaim adultery on the part of plaintiff, and asked a judgment of absolute divorce. On the trial plaintiff, before resting, called the person with whom, in the answer, plaintiff was alleged to have committed adultery, who denied the same. On cross-examination he was asked and permitted to answer, under objection and exception, if he did not, at a time and place specified, admit to a person named that his relations with plaintiff were illicit;

this he denied. The person named was thereafter called as a witness by defendant, and was permitted to testify that the alleged co-respondent did make the admission. *Held*, no error.

Plaintiff set up in her complaint that defendant forbade her from visiting her parents. Defendant alleged that the reason plaintiff did not visit her mother was because they had a falling out. Defendant was permitted to testify, under objection and exception, to certain alleged communications of plaintiff's mother to him as to plaintiff's conduct with other men, which he testified he communicated to plaintiff. *Held*, that the evidence was competent.

Defendant offered and was permitted to give in evidence certain salacious verses alleged to be in plaintiff's handwriting, and to have been found in her writing desk. *Held*, no error.

Defendant, a sea captain, on return from a voyage, was met by a person who informed him of certain incriminating evidence against his wife. Defendant was permitted to testify that he proceeded at once to his house and informed plaintiff of the incident, and was permitted to testify to the interview in detail. This was objected to as incompetent under the provision of the Code of Civil Procedure (§ 831) declaring a husband or wife to be incompetent to testify against the other on trial of an action founded on an allegation of adultery, except to prove marriage or disprove the allegation of adultery. It was admitted as competent evidence on the issue as to cruel and inhuman treatment, the court stating to the jury that it was not admitted on the question of adultery. *Held*, no error.

(Argued February 8, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made August 20, 1892, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Patrick Keady for appellant. Plaintiff was entitled to judgment of separation on the evidence. (*Pollock v. Pollock*, 71 N. Y. 137; *Waltermire v. Waltermire*, 110 id. 183; *Kelly v. Kelly*, L. R. [2 P. & D.] 31, 32; *Bihin v. Bihin*, 17 Abb. Pr. 19; *Whispel v. Whispel*, 4 Barb. 217, 219; *Uhlman v. Uhlman*, 17 Abb. [N. C.] 238, 254; *Kennedy v. Kennedy*, 73 N. Y. 369; *Fowler v. Fowler*, 33 N. Y. S. R.

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746; *De Meli v. De Meli*, 120 N. Y. 485.) The evidence is insufficient to support the finding that plaintiff committed adultery. There is no proof that she did. (*Pollock v. Pollock*, 71 N. Y. 173; *Moller v. Moller*, 115 id. 466; *Conger v. Conger*, 82 id. 603; *Beadleston v. Beadleston*, 2 N. Y. Supp. 809; *Pfeiffer v. Pfeiffer*, 9 id. 28; *Hart v. Hart*, 2 Edw. Ch. 207; *Donnelly v. Donnelly*, 63 How. Pr. 481; *Ferguson v. Ferguson*, 3 Sandf. 307; *Zorskowski v. Zorskowski*, 27 How. Pr. 37; *Myers v. Myers*, 41 Barb. 114.) Even if adultery had been committed, defendant condoned the act by cohabiting with plaintiff up to July 11, 1891. (Code Civ. Pro. § 1758; *Pitts v. Pitts*, 52 N. Y. 593; 6 Mass. 147.) It was error to allow defendant to testify against his wife on the question of adultery. (Code Civ. Pro. § 831; *De Meli v. De Meli*, 120 N. Y. 492; *Bailey v. Bailey*, 41 Hun, 424; *Irsch v. Irsch*, 12 Civ. Pro. Rep. 386; 110 N. Y. 386; *Dickinson v. Dickinson*, 63 Hun, 516.) Plaintiff's exceptions were well taken. (Code Civ. Pro. § 831; *De Meli v. De Meli*, 120 N. Y. 492; *Bailey v. Bailey*, 41 Hun, 424.)

Henry A. Montfort for respondent. Respondent was permitted to give certain statements in relation to his wife's intimacy with men during his absence at sea, made to him by her mother, which he afterward communicated to the appellant, and which led to the subsequent estrangement between her and her mother. This was admissible. (*Kennedy v. Kennedy*, 73 N. Y. 369.) The respondent was allowed to show, by his own testimony, what he did immediately after receiving information of plaintiff's relations with Phillips. This was competent upon the question of cruel treatment. (*De Meli v. De Meli*, 120 N. Y. 485.)

BARTLETT, J. This is an appeal from a judgment of the general term of the second department, affirming a judgment in favor of defendant for an absolute divorce, and from an order denying motion for a new trial.

The plaintiff sued for a limited divorce, alleging that

defendant was guilty of cruel and inhuman treatment. The defendant denied the charges of the complaint, and set up by way of counterclaim the adultery of plaintiff and prayed for a judgment of absolute divorce.

The jury found against the plaintiff on her own cause of action, and also on the defendant's counterclaim.

It is now insisted on behalf of plaintiff that she was entitled to judgment of separation on the evidence; that the finding of the jury that she committed adultery is unsupported by evidence; and that there were errors of law on the trial that must lead to a reversal of the judgment. In view of the very serious consequences to the plaintiff following the affirmance of the judgment and the insistence of her counsel that finding her guilty of adultery was legal error, we have looked into the facts of this case with great care and are unable to say that either of the findings of the jury is unsupported by evidence. This case was properly submitted to the jury and their verdict is conclusive on the questions of fact.

Passing to the alleged errors of law, we will consider those upon which the learned counsel for the appellant principally relies for the reversal of this judgment. At the trial the plaintiff's counsel pursued the rather unusual course before resting his case, of anticipating the proofs of defendant to support the cause of action set up in the counterclaim. The co-respondent was placed on the stand by plaintiff and denied the acts of criminal conversation alleged in defendant's counterclaim.

On cross-examination he was asked if he did not, on a certain occasion, admit to Robert Phillips that his relations with the plaintiff were illicit. The witness was allowed to answer against the objection of plaintiff. The question was competent as laying the foundation for the collateral impeachment of the witness. The defendant subsequently put Robert Phillips on the stand, to whom this admission was alleged to have been made, and he testified it was made.

The plaintiff set up in the complaint that defendant prohibited her from visiting her parents and from going into

society even among her neighbors. The defendant alleged that the reason the plaintiff did not visit her mother was they had a falling out between themselves. The defendant was allowed to testify, the plaintiff objecting, to certain alleged communications of plaintiff's mother to him concerning the conduct of plaintiff with other men which defendant communicated to plaintiff. This was competent evidence as showing great provocation for the use of violent language by defendant addressed to his wife; it also tended to disprove the charge that defendant had separated the mother from her daughter. It is true the mother denied, on the stand, the conversation testified to by defendant, but all this evidence was clearly competent and was properly submitted to the jury on the issue of cruel and inhuman treatment. (*Kennedy v. Kennedy*, 73 N.Y. 369.)

The next exception refers to the admission in evidence of defendant's exhibit No. 2, being certain salacious verses, alleged to have been in the handwriting of plaintiff and found in her private writing desk by defendant. We think this exhibit was properly admitted, and that the evidence as to its discovery, and as to its being in plaintiff's handwriting, was sufficient to go to the jury.

The next exception was strenuously urged upon our attention on the argument. The defendant, a sea captain, on returning from a voyage, was met on board his vessel at the wharf by Robert Phillips, a cousin of the co-respondent, and informed of certain incriminating evidence against his wife. Defendant was allowed, notwithstanding plaintiff's objection, to testify that he proceeded at once to his house and informed his wife of the incident; he was permitted to state to the jury the interview in detail. The plaintiff's counsel insists this evidence was received in violation of section 831 of the Code of Civil Procedure, which provides that a husband or a wife is not competent to testify against the other upon the trial of an action founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery.

We think this evidence was competent on the issue of cruel and inhuman treatment, and the trial judge properly admitted it, stating as he did to the jury that it was not admitted as bearing on the question of adultery. It is urged that this testimony was calculated to greatly prejudice the plaintiff in the minds of the jury. Where the issues in a case like the one at bar are tried together, this difficulty seems to be inherent. Testimony competent on either issue must be admitted. (*De Meli v. De Meli*, 120 N. Y. 485.) A separate trial of the issues would enable parties to limit evidence to its legitimate scope. A further answer to the exception under consideration is that plaintiff was not prejudiced by this evidence, as defendant subsequently put Robert Phillips on the stand, and he swore to the incriminating facts communicated to the defendant on his ship, the plaintiff's counsel withdrawing his objection to the testimony.

The plaintiff excepts to the finding of the jury that defendant had not condoned plaintiff's offense. There was sufficient evidence to submit to the jury on this point, and their answer to this question is conclusive. We have examined the other exceptions in the record, and are of opinion that none of them is tenable.

The judgment and order should be affirmed, with costs.

All concur.

Judgment and order affirmed.

JOHN MARONEY et al., Appellants, v. MARGARET BOYLE et al.,
Impleaded, etc., Respondents.

A grantor of land does not waive his equitable lien for unpaid purchase money by taking the promissory note of the grantee therefor, although in taking it he relies upon the solvency and financial ability of the grantee to pay the note, and does not have in contemplation the enforcement of the lien; he retains it, unless he expressly and consciously relinquishes it.

The lien is valid against one who takes a conveyance from the grantee with knowledge of the existence of the claim for the unpaid purchase money.

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This equitable lien, however, will not prevail against one without notice thereof, who takes an incumbrance on the land, an interest therein or a conveyance thereof, in good faith and for a valuable consideration.

A purchaser on sale of land on execution, having paid the purchase price, and received the sheriff's certificate of sale, after obtaining the sheriff's deed is in the same position as if the deed had been executed by the judgment debtor when the judgment was docketed, and while holding the certificate he is to be regarded the same as if the debtor had at the time of docketing the judgment executed a contract of sale and received the full purchase price.

Such a purchaser, therefore, is entitled to protection against an outstanding and unknown lien for purchase money in favor of a former grantor.

Where, therefore, in an action by a grantor to enforce a lien for unpaid purchase money, it appeared that defendant D. purchased the land on sale under an execution against one who at the time of the rendition of the judgments held the title under a deed from plaintiffs' grantee; that D. purchased in good faith without notice of plaintiffs' lien, and paid the purchase price in full; that at the time of the commencement of the action he held the sheriff's certificate of sale, *held*, that the lien was not enforceable; also, that the rights of D. were not affected by the fact that the purchase price paid by him was small.

(Argued February 9, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term dismissing the complaint.

This action was brought to enforce the equitable lien of the plaintiffs for the purchase money of land conveyed by them to the defendant Margaret Boyle.

The facts found at the Special Term are substantially as follows: That on the 20th day of August, 1887, the plaintiffs were the owners of the land described in the complaint, and on that day for a valuable consideration they sold and conveyed the land to the defendant Margaret Boyle, who then paid to them \$500 of the purchase money, and gave to the plaintiff John Maroney her individual promissory note to secure the payment of the sum of \$2,000, the balance of the purchase money; that at the same time the plaintiffs waived

whatever equitable lien they had upon the land for purchase money ; that Margaret Boyle was financially solvent and the estate of Peter Boyle, deceased, the husband of Margaret Boyle, was also solvent, and the plaintiffs in making the deed and accepting the note relied upon the individual responsibility of Margaret Boyle ; that immediately after the delivery of the deed and note Margaret Boyle entered into possession of the land, and on or about the 18th day of September, 1887, she, for the consideration of \$2,000, executed to the defendant Edward D. Boyle a deed conveying the land to him ; that immediately thereafter Edward entered into the possession of the land, and has ever since remained in the possession thereof ; that in the months of March and April, 1888, he paid to the plaintiffs \$500 in money to apply both on the purchase money of the land due from him to Margaret Boyle, and upon the purchase money thereof due from her to the plaintiffs, and about the same time he fully paid to her, out of his distributive share of his father's estate, the balance of the purchase money ; that in purchasing the land and paying for the same Edward relied upon the belief and fact that the plaintiffs had waived their equitable lien thereon for purchase money ; that at the time of his purchase Edward was financially solvent, but about the month of October, 1888, he became insolvent ; that by reason of indorsing the notes of Edward his mother also became insolvent and unable to pay the note held by John Maroney ; that during the months of October, November and December, 1888, and January and February, 1889, ten judgments were recovered against Edward D. Boyle and docketed in the office of the clerk of the county of Cattaraugus, and became liens upon his real property situated in Cattaraugus county, which judgments amounted in all to upwards of \$3,000 ; that about the months of April and May, 1889, and before the commencement of this action, the defendant Frank W. Davis purchased the several judgments from the plaintiffs in and owners thereof, and paid to them the full amounts thereof in money, and received from them written assignments thereof, whereby he became and still is the owner of the same, except judgments so

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recovered by one Barry, by the First National Bank of Salamanca and by two other persons; that Barry refused to sell his judgment to Davis and caused an execution thereon to be issued to the sheriff by virtue of which, after due notice of sale, he, on the 20th day of April, 1889, sold the land at public auction to Davis for the sum of \$86.12, and thereupon executed to him his written certificate of sale in the form required by law, and Davis immediately paid the purchase price; that Davis never had any notice until after he had purchased the judgments and received the sheriff's certificate of sale and had fully paid for the same, that the plaintiffs ever had any lien upon or interest in the land since they conveyed the same to Margaret Boyle; that the First National Bank of Salamanca caused executions upon its two judgments to be duly issued to the sheriff, who, by virtue thereof, and pursuant to due notice of sale, did, on the 27th day of May, 1889, sell the land to the defendant Charles I. Baker, at public auction, for the sum of \$950, which Baker then paid to him, and thereupon the sheriff executed and delivered to him his certificate of sale thereof in the form required by law; that Baker never had any notice until after he had purchased the land, paid the \$950 and received the certificate, that the plaintiffs, or either of them, ever had any lien upon or interest in the land; that at the time the plaintiffs sold and conveyed the land to Margaret Boyle, and received her note, they believed and relied upon the then supposed fact that the note was, in effect, the note of Margaret Boyle, in her capacity of administratrix of the estate of Peter Boyle, effectual to bind that estate for its payment, and not her individual obligation.

And the court dismissed the complaint as to the defendants Margaret Boyle, Baker and Davis, who alone appear to have defended the action, and ordered judgment to that effect. The plaintiffs appealed to the General Term and then to this court.

C. S. Cary for appellants. Ample foundation for a vendor's equitable lien is established by the undisputed evidence. (2

Story's Eq. Juris. §§ 1217, 1218, 1219; 1 id. §§ 788, 789; *Garson v. Green*, 1 Johns. Ch. 308; *Champion v. Brown*, 6 id. 398; *Shirley v. Shirley*, 2 Edw. Ch. 505.) There was no waiver. (2 Story's Eq. Juris. § 1226; *Hallock v. Smith*, 3 Barb. 267.) This lien prevails against the assignee of the vendee and against the judgment creditor. (*Dusenbury v. Hurlbut*, 59 N. Y. 511; *Seymour v. McKinstry*, 106 id. 230; Story's Eq. Juris. § 1228; *In re Howe*, 1 Paige Ch. 124; *Arnold v. Patrick*, 6 id. 310; *Lamberton v. Vorhees*, 15 Hun, 336; 2 Pom. Eq. Juris. 177.) There was sufficient notice to Baker & Davis. (Story's Eq. Juris. §§ 400, 408.)

E. D. Northrup for respondents. Only one exception was taken in the case, and that, if error at all, was a harmless one. It would not even in an action at law be any grounds for the reversal of a judgment. The witness Edward D. Boyle had just testified without objection that he had purchased the premises for \$2,000, and was allowed to further testify that the premises were then worth about that sum. (*People v. Gonzales*, 35 N. Y. 49; *Forest v. Forest*, 25 id. 510; *Kelsey v. Cooley*, 11 N. Y. Supp. 746; *McSorley v. Hughes*, 12 id. 179; *Taylor v. Taylor*, 13 id. 56; *Hardy v. N. Y. C. & H. R. R. Co.*, 12 id. 55; *Rockwell v. Hurst*, 13 id. 291; *Doyle v. Beaupre*, 17 id. 287, 288.) Plaintiffs, by numerous acts, impliedly and also expressly waived their lien. (*Fish v. Howland*, 1 Paige, 20; *Brown v. Gillman*, 4 Wheat. 255; *Bailey v. Greenleaf*, 7 id. 46; *Mackreth v. Symmons*, 15 Ves. 329; *White v. Williams*, 1 Paige, 502; *Miles v. D. F. Co.*, 125 N. Y. 294.) But large equitable rights of subsequent *bona fide* purchasers have also intervened. The defendant Frank W. Davis, subsequently to the plaintiffs' sale of the property, purchased the land at sheriff's sale in good faith and without notice that they claimed any lien upon it, and in connection therewith purchased judgments that are liens thereon, in all paying about \$1,200. His equity deserves the highest consideration in this court, and his purchase should be held superior in right to the assumed

lien of the plaintiffs. (*Burlingame v. Robbins*, 21 Barb. 327; *Clark v. McNeal*, 114 N. Y. 287, 295; *Jackson v. Dubois*, 4 Johns. 216; *Jackson v. Chamberlain*, 8 Wend. 620; *Hetzel v. Barber*, 69 N. Y. 10; *Wood v. Chapin*, 13 id. 509.) While defendant Frank W. Davis holds priority of lien by virtue of his said purchase at the sheriff's sale, it also seems plainly to appear that the said judgments which he purchased have, in his hands, priority over any claim of the plaintiffs. (*Spring v. Short*, 90 N. Y. 542, 543; *Fisk v. Potter*, 2 Keyes, 64; *Hulett v. Whipple*, 58 Barb. 224; *Bailey v. Greenleaf*, 7 Wheat. 46.)

EARL, J. When Edward D. Boyle took his deed he had notice of the plaintiffs' claim for unpaid purchase money, and, therefore, he did not acquire a better position than his grantor had. We think there can be no doubt that, as against him and his grantor, the plaintiffs had and retained their equitable lien. They took the promissory note of their grantee for the balance of the purchase money. It was not taken as payment, but simply as evidence of the amount due and the time and mode of payment. It has been many times held that the grantor does not waive his equitable lien for the purchase money by simply taking the individual note, bond or covenant of the grantee. He may rely in taking such an individual obligation upon the solvency and financial ability of the grantee, and he may not know that he has any lien upon the land, or actually rely upon any lien, and he may not have in contemplation the enforcement of the lien at any time, and yet, unless in such a case he expressly and consciously waives his lien, he retains it. If, however, he takes any security for the purchase money, as a mortgage upon the same or other property, or the note or other obligation of a third party, he will be held to have waived his purchase-money lien, unless he has in some way expressly retained it. (2 Story's Eq. Jur. §§ 1217, *et seq.*; 4 Kent's Com. 152; 3 Pomeroy's Eq. Jur. §§ 1249, *et seq.*; *Mackreth v. Symmons*, 15 Ves. 329; *Bailey v. Greenleaf*, 7 Wheat. 46; *Garson v. Green*, 1 John. Ch.

308; *Champion v. Brown*, 6 id. 398; *Shirley v. Sugar Refinery*, 2 Ed. Ch. 505; *Hulett v. Whipple*, 58 Barb. 224; *Hallock v. Smith*, 3 id. 267; *Vail v. Foster*, 4 N. Y. 312; *Seymour v. McKinstry*, 106 id. 230.)

We find in this record no evidence whatever sufficient in law to show a waiver of their lien by the plaintiffs. It is quite true that they relied upon the personal responsibility of their grantee. That is always so when the grantor takes the mere personal obligation of the grantee for the purchase money of land sold, and yet it has never been held that the personal obligation of the grantee thus taken deprives the grantor of his lien.

The counsel for the respondents makes much of the fact that the note was signed by Mrs. Boyle, attaching to her name "administratrix to the estate of Peter Boyle, deceased." The deed ran to her by the same description, and she deeded to her son by the same description. She, nevertheless, whatever may have been supposed at the time, took the deed in her own right, and the note was her personal obligation, and all the plaintiffs got, or intended to get, was the obligation of the real grantee.

We, therefore, think the learned trial judge erred in his finding of fact that the plaintiffs had, either as to Margaret Boyle or her son, waived their lien for the purchase money by anything which took place at the time of their conveyance of the land. But this error was harmless, as the defendant Davis purchased the land under such circumstances that he has protection against the lien. He purchased the land at the sheriff's sale without any notice of the plaintiffs' lien, and he paid to the sheriff the amount of his bid in money. He took the sheriff's certificate of sale, and since the trial of this action he has received the sheriff's deed, as we are now informed by the production thereof upon the argument here. We will, however, ignore the deed, and treat the case as if Davis held only the certificate.

The examination of many authorities shows that the vendor's lien is not now a favorite with courts of equity, and that

it has many times been enforced with reluctance and misgivings. Equity judges have found it difficult to find any justifiable basis for it to rest on, and they have differed as to the grounds and reasons for its introduction into the equity jurisprudence of England and of this country. It has been repudiated in some of the states by the courts, and in others, it has been abrogated by legislative enactments. It is against the general policy of our law, which looks with disfavor upon secret interests in real estate, and requires generally that titles to real estate shall be created by some writings which shall be spread upon the public records for the protection of those who might trust to titles apparently sound but afflicted with secret infirmities. It generally gives way to a legal interest or to a superior equity, and as it is a matter of purely equitable cognizance it should never be enforced when it would be inequitable to do so. Hence, it is never allowed to prevail against one who takes an incumbrance upon the land, or an interest therein, or a conveyance thereof, in good faith without notice of the lien and for a valuable consideration parted with before such notice.

Now, what is the status of Davis holding the sheriff's certificate of sale? Why should he not be protected? Such a purchaser, after he obtains the sheriff's deed, is in the same position as he would have been if the deed had been executed by the judgment debtor at the time the judgment was docketed. In *Hetzel v. Barber* (69 N. Y. 1) we said: "A sheriff's deed, given in pursuance of a judgment and a sale upon execution, is treated as if given by the judgment debtor himself. It conveys precisely what he could have conveyed when the judgment was docketed. The sheriff, by authority of law, takes his property and conveys it to satisfy his debt, and the transfer is the same as if the sheriff had in fact acted as the authorized attorney of the debtor. The grantee in such cases holds not under the sheriff, but under the debtor, and the deed, when recorded, is protected by and has the benefit of the Recording Act." (See, also, *Freeman on Judgments*, §§ 366, 366a.) Therefore, if Davis had taken the sheriff's deed

before the trial of this action, he would have had the same protection against the plaintiff's lien as he would have had if he had in good faith and for money paid taken a deed from Mrs. Boyle or her son. But the mere fact that he did not then have the deed can make no difference. The sheriff's certificate must be regarded the same as if at the time of docketing the judgment the debtor had executed a contract of sale embodying the same terms, and had received the full purchase price. The debtor would in that event have held the legal title of the land as trustee for the purchaser. The title of the purchaser would have been contingent and conditional on account of the right of redemption existing in the debtor and his creditors. But, nevertheless, he would have become the purchaser of just such a right and interest as he bargained for and paid to obtain, and he would have had protection against any outstanding secret and unknown lien for the purchase price. We think it is, therefore, clear that by his purchase of the land at the sheriff's sale, and full payment of the purchase price, Davis obtained protection against the plaintiff's lien.

We cannot hold that, as matter of law, there was anything to give Davis constructive notice of plaintiffs' lien. The form of the deeds to Mrs. Boyle and to her son, and the fact that the deed to the son was not recorded, are of no significance upon the question of notice. They do not suggest the non-payment of the purchase price to the plaintiffs, or the existence of their lien. The rights of Davis are not affected by the small amount of the purchase price. There was one judgment anterior to that under which he purchased, and he held several junior judgments, and the whole situation must be taken into account in considering the price paid. It is a significant fact that the interest he purchased was not considered sufficiently valuable to induce any one to redeem from him. Even if he made a good bargain he was entitled to the benefit of it.

The equities of the plaintiffs are not enlarged because Davis made the purchase, expecting thereby in some way to benefit or protect the family of Peter Boyle deceased. His

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Statement of case.

position and rights would be the same if he only held the land as security.

To the suggestion made by the learned counsel for the plaintiffs that they could in some way be subrogated to the rights of Davis by payment to him of the amount paid by him, or have the right by the judgment in this action to redeem from him, or that he should be turned over to other property of the judgment debtor for his reimbursement, the plain answer is that the complaint was not framed for such relief, the action was not tried with the view to such relief, and there are no findings or exceptions which present the matter for our consideration.

The defendant Baker appears to have the same defense to the action which Davis has. But we have paid no attention to him as his answer to the complaint does not appear in the record; he was not made a respondent upon this appeal and no one appeared for him upon the argument before us.

Our conclusion, therefore, is that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

THE PEOPLE ex rel. THE EDISON ELECTRIC ILLUMINATING
COMPANY of New York, Appellant, v. EDWARD WEMPLE,
Comptroller, etc., Respondent.

Under the provisions of the Corporation Tax Act (Chap. 542, Laws of 1880), added by the amendment of 1889 (Chap. 463, Laws of 1889), giving to the state comptroller power to revise and adjust any account theretofore settled against a corporation for taxes arising under the act, and authorizing a review by certiorari of the action of the comptroller, relief may be given as provided where a tax has been imposed upon and paid by a corporation which was exempt from any taxation under the act.

The fact that the payment was not made under coercion does not deprive the corporation of the relief so granted.

Where a corporation made a report to the comptroller stating facts from which the amount of the illegal tax was ascertained and imposed, *held*, that this did not amount to a stipulation by virtue of which such tax

was paid within the meaning of the section (§ 2) exempting such a case from the application of said provisions.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 14, 1893, which affirmed the decision of the comptroller of the state and dismissed a writ of certiorari to review a determination made by him denying an application by the relator for the revision and re-settlement of a tax.

The facts, so far as material, are stated in the opinion.

Eugene H. Lewis for appellant. During the years 1886, 1887 and 1888 the relator was engaged in business as a manufacturing company within the state, and, as such, was exempt from the payment of taxes for said years. (129 N. Y. 543, 664.) Manufacturing companies were expressly exempted from the tax; in such case the tax is recoverable without specially provided remedies. (*People ex rel. v. Wemple*, 129 N. Y. 664; *T. B. I. W. Co. v. City of New Orleans*, 44 La. Ann. 554.) The statute provides a remedy for re-settling an account for taxes under the act of 1880, where the same has been illegally paid or so made as to include taxes which could not have been lawfully demanded, and it is that remedy which the relator now asks to have applied. (Laws of 1889, chap. 46, §§ 1, 19, 20; *People ex rel. v. Wemple*, 133 N. Y. 617; Cooley on Taxn. 806; *People ex rel. v. Otsego County*, 51 N. Y. 401; *Dickey v. County of Polk*, 58 Iowa, 287; Code Civ. Pro. § 870; *Richards v. Wapello County*, 48 Iowa, 507; Laws of 1880, chap. 542, § 19.)

T. E. Hancock, Attorney-General, for respondent. The determination of the comptroller in declining to set aside the tax assessed upon the relator was justified. (*People ex rel. v. Wemple*, 129 N. Y. 664; Laws of 1889, chap. 463, § 3; *Diefenthaler v. Mayor, etc.*, 111 N. Y. 338; Cooley on Taxn. 567; *J. & B. R. Co. v. City of Brooklyn*, 123 N. Y. 380; *Redmond v. Mayor, etc.*, 125 id. 632; Dillon on Mun. Corp.

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§ 940; *Peyser v. Mayor, etc.*, 70 N. Y. 497; *Phelps v. Mayor, etc.*, 112 id. 222; *Brisbane v. Dacres*, 5 Taunt. 143; *Silliman v. Wing*, 7 Hill, 159; *Preston v. Boston*, 12 Pick. 14.) The statute, as amended in 1889, does not change the rule contended for. (Code Civ. Pro. § 2140.)

PECKHAM, J. The relator was organized under the general law of 1848 (and the various acts amending the same) providing for the formation of gas light companies (Chap. 37 of the Laws of 1848).

Pursuant to the provisions of the law providing for the taxation of certain corporations, the relator annually before Nov. 15, in each of the years 1886, 1887 and 1888, made a report to the comptroller, for the purpose of enabling that officer to make a valuation of the capital stock of the relator, and thus to ascertain the amount of the tax which the company was supposed to be liable to pay. The comptroller did make this valuation, and he ascertained therefrom the amount of the tax upon the relator for each of above-mentioned years, and notice of the amount thus fixed each year was sent by the comptroller to the relator, and the relator then paid the amount so fixed each year into the state treasury, without objection or protest. Subsequently the relator made application to the comptroller for a revision and re-adjustment of these accounts, which application was denied in November, 1890. The relator, considering the action of the comptroller to be erroneous, and believing that it was itself exempt from taxation for those years under the State Corporation Tax Act, because it was a manufacturing corporation, sued out a writ of certiorari to review the action of the comptroller in refusing to re-adjust the accounts mentioned. The General Term upon the return of the writ held that the payments of the relator were voluntary payments, and that, therefore, the relator had no remedy under the statute, and dismissed the writ with costs. The statute under which the relator has proceeded is chapter 463 of the Laws of 1889, which amends the Corporation Act of

1880, as amended in 1881, by adding sections 19 and 20 to the act.

The amendments of 1889 are as follows :

"Sec. 19. The Comptroller may at any time revise and re-adjust any account theretofore settled against any person, association, corporation or joint-stock company, by himself or any preceding Comptroller for taxes arising under this act or the act to which it is an amendment whenever it shall be made to appear by evidence submitted to him that the same has been illegally paid or so made as to include taxes which could not have been lawfully demanded, and shall re-settle the same according to law and the facts and charge or credit as the case may require the difference, if any, resulting from such revision and re-settlement upon the current accounts of such person, association, corporation or joint-stock company.

"Sec. 20. The action of the Comptroller upon any application made to him by any person or corporation for a revision and re-settlement of accounts as provided in this act, may be reviewed, both upon the law and the facts upon certiorari by the Supreme Court at the instance either of the party making such application or of the Attorney-General in the name and in behalf of the People of this State, and for that purpose the Comptroller shall return to such certiorari the accounts and all the evidence submitted to him on such application, and if the original or re-settled accounts shall be found erroneous or illegal by that court, either in point of law or of fact, the said accounts shall be there corrected and re-stated by the said Supreme Court, and from any such determination of the Supreme Court an appeal may be taken by either party to the Court of Appeals as in other cases.

"Sec. 2. None of the provisions of this act shall apply to any taxes heretofore paid by any person or corporation in pursuance of a judgment or order of a court or by virtue of any stipulation."

Under the decisions of this court in 129 N. Y. 543 and 664, the taxation upon the relator for the years above mentioned was illegal. The corporation was not subject to the exaction,

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and although it paid the same there was in reality no legal liability imposed upon it to make the payment. The question now for us to determine is whether the statute above quoted gives the relator any remedy whatever.

The learned General Term has held that no relief could be given under that act because the payments made by relator were not made under coercion, but were what is termed voluntary payments, that is, payments which relator made under a claim from the taxing authorities that the law compelled it so to do. We think the act provides for just such cases as the relator's. The comptroller is to revise and re-adjust any account for taxes whenever, among other things, it shall be made to appear that the tax has been illegally paid or so made as to involve taxes which could not have been lawfully demanded. Here the payment was made in regard to taxes which could not have been lawfully demanded because as we have held the corporation was entirely exempt from any taxation under the Corporation Tax Law as it stood during these years. Language cannot as it seems to us be plainer, and we are at a loss to know when the act would apply if it be not applicable to such a case as this. The various cases cited by counsel holding that voluntary payments cannot be recovered back are not in point where the question is as to the meaning of this statute. We have no doubt as to what that meaning is, nor any that it includes such a case as the relator has here proved.

Nor does the case of the relator come within the exception contained in section 2 of the act of 1889. The payments were not made in pursuance of a judgment or order of any court, nor was the report that the relator made in each year containing facts upon which the amount of the tax was ascertained and imposed, a "stipulation by virtue of which such tax was paid." We think the relator was entitled to the relief which it sought. (*People, etc., v. Wemple*, 133 N. Y. 617.)

The determination of the comptroller should be reversed and the accounts of the relator for the years mentioned should be revised and re-adjusted by him, and the full

amounts paid by the relator into the treasury of the state with interest should be credited by the comptroller upon the current accounts of the relator as provided for by the act.

For that purpose the order of the General Term quashing the writ of certiorari should be reversed, with costs and further proceedings taken in accordance with this opinion.

All concur.

Order reversed.

THE PEOPLE ex rel. THE PRATT INSTITUTE, Appellant, v.
THE BOARD OF ASSESSORS OF THE CITY OF BROOKLYN,
Respondent.

The term "local," as used in the provision of the act incorporating the Pratt Institute (§ 10, chap. 398, Laws of 1887), which exempts from "local taxation" property of the institute in the city of Brooklyn occupied and used for its corporate purposes, was intended to distinguish the taxation referred to from that which is general and for the whole state, and so, the provision exempts the property from all taxation, except for state purposes.

Accordingly *held*, the corporation was exempted from taxation upon such property for county as well as for city purposes.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from an order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendants, the assessors and comptroller of the city of Brooklyn, to cancel the taxes imposed for 1892, other than for state purposes, on certain property of the relator, and denied said motion.

The facts, so far as material, are stated in the opinion.

Jesse Johnson for appellant. Local taxation includes county taxation; an exemption from local taxation is an exemption from county taxation. (*Jones v. Chamberlain*, 109 N. Y. 100; *People ex rel. v. Davenport*, 91 id. 574; *Ferguson v. Ross*, 126 id. 464; *Bailey v. Maguire*, 22 Wall. 215; Const.

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art. 3, § 16; *People ex rel. v. Hills*, 35 N. Y. 449; 46 Barb. 340; *People v. O'Brien*, 38 N. Y. 193; Burroughs on Taxation, §§ 26-28.)

Henry Yonge and *Albert G. McDonald* for respondent. The expression, "shall not be subject to local taxation," relates to and includes only taxes for city purposes. (*People ex rel. v. Coleman*, 135 N. Y. 231; Laws of 1887, chap. 398, §§ 10, 20; Dillon on Mun. Corp. § 23.)

GRAY, J. The Pratt Institute was incorporated under chapter 398 of the Laws of 1887; for the purpose of establishing in the city of Brooklyn an educational institution, in which persons of both sexes may be taught various branches of useful and practical knowledge and through which advantages might be offered for mental improvement, in the establishment of lectures, art collections etc., etc. It was provided in the act that "any property in the city of Brooklyn actually occupied and used for the purposes aforesaid, or the revenues of which are exclusively devoted to the purpose aforesaid, shall not be subject to local taxation; but this exemption shall not apply to any property in excess of the value of three million of dollars." The corporate property is within that limit of value and the question, which this proceeding presents, is whether the provision for exemption in the statute relates to taxation for city purposes only; or to taxation for the purposes of both the city of Brooklyn and county of Kings. We think it very clear that the intention of the legislature was to exempt this corporation from all taxation, save for state purposes. The term "local" as applied to taxation would ordinarily be used, and it would be generally so understood, to distinguish it from that taxation which is general and for the whole state. As to the state, all taxation is local, which is not for the common benefit of its citizens, but only for those residing in a political subdivision or section.

When the legislature confers upon a corporation exemption

from local taxation, its apparent object would fail of attainment, if the locality, from which is taken away the power to tax, be limited to the municipality, within which the property is situated; for the property would still be left subject to a local taxation for county purposes. That would not be a reasonable, nor a logical view of the legislative act. The respondents argue that the act fixes the locality of the exemption, when it speaks of "any property in the city of Brooklyn" as not being subject to local taxation, and that the city only is deprived of the power to tax. The argument is forced. The legislature had in view a proposal to establish this beneficent institution in the city of Brooklyn, with all the benefits which would result to the community in that section of the state, and intended that its property, if acquired and used in that city for the corporate purposes, should not be taxed except only for state purposes. The compact with the state was that, in consideration of the grant of corporate franchises, powers and privileges, including immunity from any taxation of a local nature, the incorporators would establish and carry out their beneficent project, and the only limitation upon the exemption of property from taxation was that it should apply only to such property as was used by the corporation in the city of Brooklyn.

In our judgment this institution was given exemption from all taxation at the hands of local authorities, for the purposes of either the city or the county, and was only liable to assessment for what might be due to the state.

The order of the General Term should be reversed and the order of the Special Term should be affirmed, with costs in General Term and in this court.

All concur, except ANDREWS, Ch. J., dissenting, and EARL, J., not voting.

Ordered accordingly.

In the Matter of the Appraisal for Taxation of the Estate of
WILLIAM W. MERRIAM, Deceased.

141	479
144	12
141	479
148	813
141	479
150	6
150	16

The United States is to be regarded as a body politic and corporate, and so far as this state is concerned, it is a foreign, not a domestic, corporation. (Code Civ. Pro. § 3843, sub. 18.)

Under the provision of the Collateral Inheritance Act of 1892 (§ 1, chap. 399, Laws of 1892) which imposes a tax upon the transfer, "by will or intestate law," of any property of the value of \$500, "to persons or corporations not exempt by law from taxation," a bequest to the United States is subject to the tax so imposed.

The tax is not imposed upon the property, but on the right of succession under the will, and the property that vests under it in the United States is the net amount of the bequest after the succession tax is paid.

Stocks of foreign corporations, held by an executor as such, are to be regarded as part of the estate, and so the right of succession thereto is subject to payment of the tax imposed by said act.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which affirmed an order of the Surrogate's Court of Suffolk county affirming an order of said court assessing and fixing the collateral inheritance tax due from the estate of William W. Merriam, deceased.

The facts, so far as material, are stated in the opinion.

Jesse Johnson for appellant. A devise to the government of the United States, by the express terms of the statute imposing this tax, is exempt from the tax. (*In re Prime*, 136 N. Y. 347; *Comm. v. Marshall*, 11 Pick. 350; *Yeaton v. U. S.*, 5 Cranch, 281; *Butler v. Palmer*, 1 Hill, 324; *Miller's Case*, 1 Wm. Black. 451; *People ex rel. v. Davenport*, 91 N. Y. 574; *In re Enston*, 113 id. 174, 178; *In re Vassar*, 127 id. 1, 12; *U. S. v. Fox*, 52 id. 530; 94 U. S. 315; *U. S. v. Tingey*, 5 Pet. 115, 128; *U. S. v. Bradley*, 10 id. 343, 359, 360; *U. S. v. Lynn*, 15 id. 311; *Dugan v. U. S.*, 3 Wheat. 173, 181; Laws 1833, chaps. 96, 181; Laws 1839, chaps. 29, 232; Laws 1840, chap. 155; Laws 1846, chap. 25; Laws 1847, chaps. 153, 196; Laws 1850, chap. 222; Laws

1861, chaps. 223, 313; Laws 1874, chap. 432; Laws 1862, chap. 253; Laws 1865, chap. 523; Laws 1866, chap. 862.) Laws which in terms are broad enough to impose a tax on the property of the state or of the United States will nevertheless not be construed as so doing unless they in terms say so. (Cooley on Taxn. 130; *City of Rochester v. Town of Rush*, 80 N. Y. 302.) Apart from statute, the state has no power to tax the property of the government of the United States. (*Van Brocklin v. State*, 117 U. S. 151; *M'Cullough v. Maryland*, 4 Wheat. 316, 425; *Osborne v. Bank of U. S.*, 9 id. 738, 870.) Stock held by the decedent in foreign corporations should not be included in the value on which the tax is to be levied. (*In re Thomas*, 24 N. Y. Supp. 713.)

Charles Duane Baker for appellant. Property of the United States cannot be taxed by a state. (*People ex rel. v. U. S.*, 93 Ill. 30; *Van Brocklin v. Anderson*, 117 U. S. 162; *Fagan v. City of Chicago*, 84 Ill. 233; *T. Co. v. Wheeling*, 99 U. S. 273; *State Tonnage Tax Cases*, 12 Wall. 204; *McGoon v. Scales*, 9 id. 23; *R. Co. v. Prescott*, 16 id. 603; *Thomson v. P. R. R. Co.*, 9 id. 579; *U. P. R. R. Co. v. Peniston*, 18 id. 5, 32, 34, 41; *People ex rel. v. Wemple*, 138 N. Y. 1.) The legacy in question on the death of the testator vested immediately in the United States, and became at once their property, free from liability to taxation. (Lawson's Rights & Rem. § 3270; *Blinn v. Seymour*, 38 N. Y. 469; *Trauer v. Schell*, 20 id. 89; *Dominick v. Moore*, 2 Bradf. 201; *Maurice v. Maurice*, 43 N. Y. 369; *Filton v. Lawyer*, 41 N. H. 202, 212; *Warner v. Durant*, 76 N. Y. 133, 136; Laws of 1885, chap. 483.) The United States was not vested with the ownership of the legacy charged with a tax in its inception. (Laws of 1885, chap. 483; *In re Vassar*, 127 N. Y. 1.) A tax under chapter 483, Laws 1885, and the acts amendatory thereof, is to be paid out of the fund or legacy upon which it is assessed in the first instance, and, therefore, it is contended that calling the tax a tax on the transfer of, or on a succession to, or on a privilege to take property does not cure the diffi-

culty, because the burden, by the terms of the statute, must follow the fund and withdraw therefrom the amount of the tax. (*Stevenson v. Newnham*, 10 C. B. 713.) If, however, the tax is imposed on a privilege to acquire property, or on a transfer of property, or on a right of succession to property under a will, the effect is the same, and the same principle of exemption applies as if imposed upon the property, which in this case would be the legacy itself. (Laws of 1885, chap. 483, §§ 1-6; *In re Swift*, 137 N. Y. 77; *McCulloch v. Maryland*, 4 Wheat. 319; *Crandall v. State*, 6 Wall. 35; *Weston v. City of Charleston*, 2 Pet. 449; *People v. Tax Comrs.*, 2 Black, 620; 1 Kent's Comm. 425.) The legacy in question is exempt from taxation by Revised Statutes of the state of New York, page 932, section 5. (*W. U. T. Co. v. Richmond*, 26 Gratt. 1.) The United States are not "a body politic or corporate," "or a person," within the meaning of those terms as employed in chapter 483, Laws of 1885. (*Stanley v. Schwalby*, 147 U. S. 508-515; 1 Beach on Corp. § 2; *Warner v. Beers*, 23 Wend. 176; *Thomas v. Dakin*, 22 id. 9; *Parchal v. Whitesett*, 11 Ala. [N. S.] 472; *F. B. Co. v. Wood*, 14 Ga. 80; *Atkinson v. M., etc., R. R. Co.*, 15 Ohio St. 21; *People v. Assessor of Watertown*, 1 Hill, 616; Cooley on Const. Lim. 1; *U. S. v. Cruikshank*, 92 U. S. 550; *Scott v. Sardsford*, 19 How. Pr. 393; *Ablmon v. Booth*, 21 id. 506; *Lane Co. v. Oregon*, 7 Wall. 76; *Tenn. v. Davis*, 100 U. S. 257; *Dugan v. U. S.*, 3 Wheat. 181; *U. S. v. Tingey*, 5 Pet. 128; *U. S. v. Bradley*, 10 id. 343; *Neilson v. Lagow*, 12 How. [U. S.] 108; *Dixon v. U. S.*, 11 Brock. 177; *U. S. v. Maurice*, 2 id. 109; *U. S. v. Lane*, 2 McLean, 365; *Stearns v. U. S.*, 2 Paine, 301.) The United States are not bound by a state statute unless they are expressly named therein. The terms "person or body politic or corporate" in a state statute do not include the United States. (*U. S. v. Fox*, 94 U. S. 315; *King v. Allen*, 15 East, 333.) If the court should find that the government of the United States is a body politic and corporate within the meaning of the statutes of this state, it is then expressly exempted

from taxation. (Laws of 1890, chap. 553.) The government of the United States is for all purposes a domestic corporation, if it is to be considered a corporation in a legal sense, and is entitled to all the privileges and immunities of a domestic corporation in this state as well as in every state of the Union. (Code Civ. Pro. § 3343; *Stearns v. U. S.*, 2 Paine's C. C. 310.)

Edward Hassett and *Timothy M. Griffing* for respondent. The real estate of the testator did not pass to the United States under the will, and is not involved in the present controversy. (*In re Fox*, 52 N. Y. 537; 94 U. S. 315; *In re Merriam*, 136 N. Y. 58.) The tax imposed by chapter 483 of the Laws of 1885, as amended by chapter 713 of the Laws of 1887, is not a tax upon the property itself, but on the right of succession. It is a tax upon the privilege of acquiring property by will or inheritance, and is an impost upon the devolution of the estate. (*Strode v. Com.*, 52 Penn. St. 182; *Scholey v. Rew*, 23 Wall. 331; *Springer v. U. S.*, 102 U. S. 602; *In re McPherson*, 104 N. Y. 306; *In re Howard*, 5 Dem. 483; *In re Tuiggs Estate*, 15 N. Y. Supp. 548; *In re Swift*, 137 N. Y. 77; *Mayer v. Grima*, 8 How. [U. S.] 490; *In re Cullen*, 5 Misc. Rep. 173.) The United States of America is a body politic and is within the meaning of chapter 713, Laws 1887, which specifically provides that the property which shall pass by will or by the intestate laws of this state to any body politic, shall be subject to the acts provided for therein. (*U. S. v. Maurice*, 2 Brock. 96, 109; *Van Brocklin v. State*, 117 U. S. 154.) The state of New York has the right, power and jurisdiction to impose a tax upon the transfer of property, by will, to the United States of America. (*U. S. v. Fox*, 52 N. Y. 537; 94 U. S. 315; *State v. Miln*, 11 Pet. 139; *Moore v. Moore*, 47 N. Y. 467.)

Benj. F. Dos Passos for the comptroller of the city of New York, intervening by leave of court.

BARTLETT, J. This is an appeal from an order of the general term of the Supreme Court in the second department, affirming two several orders of the Surrogate's Court of

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Suffolk county. Two questions are raised by this appeal: *First*, whether or not a bequest of money to the United States is liable to pay the inheritance tax imposed by the laws of this state; *second*, can such a tax be levied on stock of a foreign corporation, which was the property of the decedent at the time of his death, the proceeds of which pass to the United States. The courts below have answered both of these questions in the affirmative. The testator died January 30th, 1889, and the tax was assessed February 16th, 1893, on the personal estate bequeathed to the United States. At that time chapter 399, Laws of 1892, entitled "An act in relation to taxable transfers of property," was in force and had repealed all previous acts, subject to a saving clause contained in section twenty-four of said act, providing, in substance, that the repeal should not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the passage of said act. Section twenty-five of said act also provides that "the provisions of this act, so far as they are substantially the same as those of laws existing April 30th, 1892, shall be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments." So that when this tax was assessed it was under the said law of 1892 construed as amending the previous statutes.

Section one of said act reads in part as follows: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, * * * to persons or corporations not exempt by law from taxation on real or personal property," etc.

In the view we take of this case the legacy to the United States is subject to this tax whether we consider the assessment as made under the language of the law of 1892, or of the various statutes it amends and repeals. Whether the transfer is "to persons or corporations," in the language of the law of 1892, or "to any person or persons, or to a body politic or corporate," in the words of the earlier statutes, we are of opinion the language includes the government of the

United States. For the purpose of receiving legacies and for many other purposes, the United States is to be regarded as a body politic and corporate. In the *United States v. Maurice et al.* (2 Brockenbrough's Reports, 96), Chief Justice MARSHALL says at page 109: "The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes."

The United States being capable of taking this legacy, it remains to consider whether there is any reason why this tax should not be collected. This court has recently decided that this tax is not imposed on property, but on the right of succession under a will, or devolution in case of intestacy. (*In the Matter of the Estate of James T. Swift*, 137 N. Y. 77.)

This tax, in effect, limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed upon the succession of property. This view eliminates from the case the point urged by the appellant that to collect this tax would be in violation of the well-established rule that the state cannot tax the property of the United States. Assuming this legacy vested in the United States at the moment of testator's death, yet in contemplation of law the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid. The appellant urges that the United States, if regarded as a corporation, is, under the act in relation to the taxable transfers of property, a corporation exempt from taxation.

This court has held that the provisions exempting the religious, charitable and other corporations named in the Inheritance Tax Acts apply only to domestic corporations. (*Matter of Estate of Prime*, 136 N. Y. 347.) It is suggested that the United States is to be regarded as a domestic corpo-

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ration, so far as the State of New York is concerned. We think this contention has no support in reason or authority. A domestic corporation is the creature of this state created by its legislature, or located here and created by or under the laws of the United States. (Code of Civil Pro., § 3343, sub. 18.) The United States is a government and body politic and corporate, ordained and established by the American people acting through the sovereignty of all the states.

There remains one other question in this case as presented by the briefs of appellant — whether the stocks of foreign corporations held by the executor are to be regarded as part of the estate, subject to the tax now under consideration. The tax being imposed on the right of succession, and not on the property, as before remarked, this question must be answered in the affirmative. To compute the succession tax on the total personal estate is not imposing a tax on the stocks of foreign corporations constituting a part of that estate.

The orders appealed from are affirmed, with costs.

All concur.

Orders affirmed.

141	485
148	587

CHARLES L. ROWLAND, Respondent, v. THOMAS F. ROWLAND,
Appellant.

The complaint herein alleged that the parties were associated in business under an agreement "in the nature of a general partnership or *quasi* partnership," by the terms of which plaintiff was entitled to draw a sum specified weekly, and was also to have a specified percentage of the net profits. The relief asked was an accounting and judgment for the amount found due. The answer alleged that the relation of the parties was that of employer and employee, plaintiff being entitled for his services to a weekly sum and a share of the profits, but a less percentage than that claimed in the complaint. Upon application for a reference it appeared that the accounting would require the examination of many transactions and items and that no difficult question of law was involved. *Held*, that in either view of the relation of the parties an order of reference was proper.

Plaintiff set forth in his complaint a settlement between the parties which he averred was induced by fraudulent representations on the part of

defendant. *Held*, that this did not affect the jurisdiction of the court to refer the case.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 15, 1894, which affirmed an order of Special Term granting a motion for a reference and appointing a referee.

The complaint in this action alleged that plaintiff and defendants were associated in business, under an agreement in the nature of a general partnership or *quasi* partnership; that plaintiff was to draw thirty dollars per week and to be also entitled to a percentage of the net profits, which it was agreed should be two per cent for the first three years, four per cent for the fourth and five per cent for the balance of the period; that statements of the profits which were not intended to be final were made from time to time and that a settlement was made which was induced by the fraudulent representations of defendant. Plaintiff prayed for an accounting and judgment for such sum as he might appear to be entitled to and for such other and further relief as he might in equity be entitled to. The answer alleged that the relation between defendant and plaintiff was that of employer and employee, and that plaintiff's compensation was to be a fixed weekly sum and a percentage of the profits, but not the same amount as was alleged in the complaint.

John L. Hill for appellant. The action is in equity—grounded, primarily, on an allegation of fraud, in order to open a settlement or statement of accounts. (*Emery v. Pease*, 20 N. Y. 62.) The defendant had a right to regard this action as in equity, resting upon the allegation of partnership, and a violation of duty by the defendant. (*Arnold v. Angell*, 62 N. Y. 512.) The recovery must, in every case, be *secundum allegata et probata*. The plaintiff must sustain his action by proof of the allegations of his complaint. He cannot change his action from one in equity to an action at

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law. (*Salter v. Ham*, 31 N. Y. 321; *Hayward v. Barron*, 19 N. Y. Supp. 383; *Heywood v. City of Buffalo*, 14 N. Y. 534, 540; *Bank v. Eames*, 1 Keyes, 588, 592; *Bell v. Merrifield*, 109 N. Y. 202, 207; *Bockes v. Lansing*, 74 id. 437, 442; *Freeman v. Grant*, 132 id. 22; *Stevens v. Mayor, etc.*, 84 id. 296, 305; *Arnold v. Angell*, 62 id. 508; *Bradley v. Aldrich*, 40 id. 504; *Moore v. Townshend*, 102 id. 387, 391.) That the trial of the action *may* involve a long account is not sufficient to sustain an order of reference; such trial *must* involve a long account to warrant its reference. (*Cassidy v. McFarland*, 139 N. Y. 201; *Salter v. Ham*, 31 id. 321.)

Edward P. Lyon for respondent. Defendant's contention that because the complaint prayed for *equitable* relief (an accounting), but the facts set forth an action *at law*, the complaint must necessarily be dismissed on the trial, and, therefore, the case should not be referred, is untenable. (*Emery v. Pease*, 20 N. Y. 62; *C. E. Ins. Co. v. Babcock*, 42 id. 647; *Rindge v. Baker*, 57 id. 223; Code Civ. Pro. § 1207; *Murtha v. Curley*, 90 N. Y. 372; *Bell v. Merrifield*, 109 id. 207; *Hale v. O. N. Bank*, 49 id. 626.) The case is one to which section 1013 of the Code is particularly applicable. (*People v. Wood*, 121 N. Y. 531; *Smith v. Bodine*, 74 id. 30.) The question of accord and satisfaction cannot be determined without going into the whole accounting. (*Palmer v. Palmer*, 13 How. Pr. 363.) The allegations of false and fraudulent representations made by the defendant to secure the receipt in full, as set out in the complaint, do not make the action one in tort. The action is still upon contract. (*People v. Wood*, 121 N. Y. 522; *Harrington v. Bruce*, 84 id. 103.) No difficult question of law will arise. If the defendant so claims, he must make it positively appear that such questions will arise. (*Patterson v. Stettauer*, 7 J. & S. 413.)

ANDREWS, Ch. J. Whether the relation between the parties was "in the nature of a general partnership or *quasi* partnership," as alleged in the complaint, or was that of employer

and employee, as alleged in the answer, will not probably be a question of much importance in the determination of the controversy. The real issue is as to the amount which the plaintiff was to receive in addition to a specific sum per week out of the net profits, and whether the alleged settlement of the plaintiff's claim was procured by the fraudulent representations of the defendant. Both parties in their verified pleadings assert that the compensation or interest of the plaintiff was to be a fixed weekly sum and a percentage of the net profits of the business. They disagree as to the amount. In either view of the relation the plaintiff has a right to demand an accounting to ascertain the sum to which he is entitled, unless concluded by payment or discharge.

The facts presented to the court upon the application for the order of reference tended to show that the accounting would involve the examination of many transactions and items, and that no difficult question of law was involved. If the action is to be regarded as equitable, which is the claim made by the defendant, it was referable by order of the court under section 1013 of the Code of Civil Procedure. In equity actions the right of trial by jury never existed, and no constitutional right is involved in a compulsory reference of equity actions. (*Camp v. Ingersoll*, 86 N. Y. 433; *Thayer v. McNaughton*, 117 id. 111.) If the action was legal and not equitable, which is the claim of the plaintiff, then the action being upon contract was, under the circumstances shown, referable.

The allegation in the complaint, made apparently in anticipation of the defense of accord and satisfaction, that an alleged settlement had been procured by fraud, did not affect the jurisdiction of the court to refer the case. It showed the right of the plaintiff to have an accounting, notwithstanding such settlement. (*People v. Wood*, 121 N. Y. 522, and cases cited; *King v. Barnes*, 109 id. 267-290.)

The order should be affirmed.

All concur.

Order affirmed.

ELLIS N. CROW, Respondent, v. PATRICK J. GLEASON,
Appellant.

In order to make a money payment a part payment of a debt, so as to take the case out of the operation of the Statute of Limitations, it must appear that the payment was made upon the particular debt, and was accepted by the creditor as such, and also that it was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor that more was due, so that a promise to pay the remainder may be inferred; mere proof of payment, without anything to show on what account or for what reason the money was paid, is of no avail to defeat the operation of the statute.

In an action brought April 28, 1890, to recover for the use of horses from April 26, 1875, to November, 1885, plaintiff's ledger showed payments at different times, the last one being credited November 13, 1885. Plaintiff never presented a statement of the general account to defendant, and so far as appeared never mentioned it to him. Bills were presented to defendant after the middle of April, 1884, to the end of the account for horses let during the previous week or month, upon which payments were made. It did not appear that defendant knew or believed that he owed the plaintiff any account that antedated the date last mentioned. *Held*, that all of the account prior to April 28, 1884, was barred by the statute.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 20, 1892, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Jesse Johnson for appellant. The evidence that plaintiff kept correct books of account was error. (Abb. Tr. Ev. 322-324; 1 Greenl. on Ev. § 118; 1 Whart. on Ev. §§ 678-700; *Tomlinson v. Borst*, 30 Barb. 42; *Vosburgh v. Thayer*, 12 Johns. 461; *Burke v. Wolf*, 6 J. & S. 271.) The plea of payment is fully sustained by the evidence. (*Decker v. Livingston*, 15 Johns. 479; *Patterson v. O'Hara*, 2 E. D. Smith, 58; Abb. Tr. Ev. 809.) All of the plaintiff's account prior to the 15th

day of April, 1884, was clearly barred by the Statute of Limitations. (Code Civ. Pro. § 382; *Green v. Disbrow*, 79 N. Y. 1; *Ross v. Ross*, 6 Hun, 80; Abb. Tr. Ev. 824; *Smith v. Ryan*, 66 N. Y. 352, 356; *Kelly v. Webber*, 27 Hun, 8; *Pickett v. King*, 34 Barb. 193; *Miller v. Talcott*, 46 id. 167; *Harper v. Farley*, 53 N. Y. 442; *Albro v. Figuera*, 60 id. 630.) There is no warrant for allowing interest on this account prior to the commencement of this action. (*Carricarti v. Blanco*, 121 N. Y. 230; *White v. Miller*, 78 id. 393.)

Edwin R. Leavitt for respondent. The proof required by the rules of evidence for the introduction of a party's regular books of account, kept by his bookkeeper in the usual course of his business, being here the respondent's ledgers, was properly given and amply sufficient for their admission in evidence, and there was no error in receiving them, irrespective of the stipulation between the parties. (*Vosburgh v. Thayer*, 12 Johns. 462; *Beatty v. Clark*, 44 id. 126; *Tomlinson v. Borst*, 30 Barb. 42; *Stroud v. Tilson*, 4 Abb. Ct. App. Dec. 324; *McGoldrick v. Traphagen*, 88 N. Y. 334; *Ives v. Waters*, 30 Hun, 297; *Taggart v. Fox*, 11 Daly, 159; *Winants v. Sherman*, 3 Hill, 74; *Low v. Payne*, 4 N. Y. 247; *Dewey v. Hotchkiss*, 30 id. 497.) While it is contended that even without the stipulation respondent gave the requisite preliminary proof for the proper admission of his ledgers, yet his proof was insufficient. (*Cobbs v. Wells*, 124 N. Y. 81.) The amount of the horse hire and the items of cash payments were undisputed; with the exception of a few small sums of money, which appear as credits upon some of the receipts in evidence, and for which the referee allowed him credit, appellant did not prove, or attempt to prove, the payment of the balance claimed due, nor did he disprove the payments made after 1884, which are credited generally on the account, and which, if anything were necessary to do so, alone take the case out of the statute. (*Riley v. Mayor, etc.*, 96 N. Y. 331.) The evidence showed that the items in the account prior to

six years before the commencement of the action were not barred by the Statute of Limitations. The Statute of Limitations does not, after the prescribed period, destroy, discharge or pay the debt, but it simply bars the remedy thereon. The debt and the obligation to pay the debt remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. (*Hurlburt v. Clark*, 128 N. Y. 297; *Van Kewen v. Parmelee*, 2 id. 256; *Johnson v. A., etc., R. R. Co.*, 54 id. 416.) A partial payment of a debt by the debtor to his creditor takes the claim out of the statute and revives the debt as effectually as an acknowledgment in writing signed. (*Gardner v. Gardner*, 19 Wkly. Dig. 249; *Nostrand v. Ditmis*, 127 N. Y. 355; *Lawrence v. Harrington*, 122 id. 415.) The doctrine of the application of payments, if necessary to be invoked, is directly in point in the respondent's favor. (*Pursell v. Fry*, 19 Hun, 595; *Smith v. Viele*, 60 N. Y. 106; *Denise v. Denise*, 110 id. 562; *Bove v. Gano*, 9 Hun, 6; *Van Rensselaer v. Roberts*, 5 Den. 470; *Bank of California v. Webb*, 94 N. Y. 467; *Jones v. Benedict*, 83 id. 87; *Thompson v. S. N. Bank*, 113 id. 326, 333; *Allen v. Culver*, 3 Den. 290; *Robinson v. Allison*, 36 Ala. 525; *Seymour v. Marvin*, 11 Barb. 90; *Green v. Disbrow*, 79 N. Y. 6; *Mills v. Davis*, 113 id. 243; *Raux v. Brand*, 90 id. 311; *Eno v. Diefendorf*, 102 id. 721.) The allowance of interest was not error. (*White v. Miller*, 78 N. Y. 396; *Robbins v. Carll*, 93 id. 657; *McMahon v. N. Y., etc., R. R. Co.*, 20 id. 463; Sedg. on Dam. § 399, p. 437; *Little v. Banks*, 85 N. Y. 267; *Foster v. Newburgh*, 66 Barb. 645; *Carricarti v. Blanco*, 121 N. Y. 230; *Green v. Disbrow*, 79 id. 9; *Kinburg v. N. Y. E. R. Co.*, 138 id. 638.) The exceptions to the findings of fact raise no question in this court, unless there is such an absence of evidence that the court can say, as matter of law, that the facts found were unproven when they can be reviewed as rulings upon questions of law. (Code Civ. Pro. §§ 992, 993; *Thompson v. Hazard*, 120 N. Y. 634; *Avery v. N. Y. C. R. R. Co.*, 121 id. 31.)

EARL, J. This action was brought to recover for the use of horses let by the plaintiff to the defendant during all the years from the 26th day of April, 1875, to some time in November, 1885. The plaintiff claims in his complaint that the whole sum for the hire of his horses was upwards of \$12,000, upon which the defendant had paid him upwards of \$10,000, leaving a balance due him of about \$2,000. The defendant in his answer denied that he had had the use of plaintiff's horses to the amount claimed by him; denied that there was anything due the plaintiff, and alleged that he had paid him in full. He also set up the Statute of Limitations. The action was commenced on the 28th day of April, 1890.

We will assume that the plaintiff's account for the use of his horses was sufficiently proved. But we are of opinion that upon the undisputed evidence all of the account prior to the 28th day of April, 1884, was barred by the Statute of Limitations.

The referee found that the last item of debit in the account was for horses furnished on the 4th day of November, 1885, and he found that the last payment made by defendant to plaintiff on account of the horse hire was \$7.00 paid November 13th, 1885, which was duly credited on the account, and that that sum was a payment upon the balance of the entire account. He further found that each and every payment made by the defendant to the plaintiff on account of the horses hired to the defendant was applied by the plaintiff upon the entire balance due therefor on the date of such payment, and was credited generally by the plaintiff upon the account; that the defendant never made any application nor requested plaintiff to make any application of any of the payments upon account of any particular portion of the horse hire, nor upon any particular portion of the indebtedness; and he found that no part of plaintiff's claim was barred by the Statute of Limitations.

The contention of the plaintiff is that the whole account is saved from the bar of the Statute of Limitations by part payments, and in that way only.

In order to make a money payment a part payment within the statute, the burden is upon the creditor to show that it was a payment of a portion of the admitted debt, and that it was paid to and accepted by him as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder. Part payment of a debt is not of itself conclusive to take the case out of the statute. In order to have that effect it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought, and that the payment was made as a part of a larger indebtedness, and under such circumstances as warrant a jury in finding an implied promise to pay the balance. If it be doubtful whether the payment was a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation. If there be a mere naked payment of money without anything to show on what account, or for what reason the money was paid, the payment will be of no avail under the statute. The payment must be made under such circumstances as to show a recognition of a larger debt remaining unpaid. These rules, in varying phraseology, are laid down and illustrated in many authorities. (*Abbott's Trial Ev.* 824; 1 *Wood on Limitations*, 271, *et seq.*; *Harper v. Fairley*, 53 N. Y. 442; *Albro v. Figuera*, 60 id. 630; *Smith v. Ryan*, 66 id. 352.)

Now what have we here? There is no proof whatever of the circumstances under which the \$7.00 was paid on the 13th of Nov., 1885. There was no proof even aside from the plaintiff's ledger in which it was credited that it was ever paid. The finding of the referee that the plaintiff credited all of the numerous payments made by the defendant during all the years upon the account generally is of no moment. The question is not how he applied the payments, but how the debtor intended they should be applied and understood

they were applied. And even if it be true that the defendant never made any particular direction as to how the payments should be applied, that is not sufficient to save the bar of the statute, unless the plaintiff can show that they were made by the defendant consciously to apply upon the whole account, and in recognition of the whole account.

Now what are the facts here bearing upon these payments? The plaintiff himself testified that he never presented a statement of the account to the defendant. So far as the evidence discloses he never mentioned the general account to the defendant and asked of him any payment thereon, and it does not appear that he ever brought the general account to the mind of the defendant at the time of any payment. On the contrary, every bill presented to the defendant, from the middle of April, 1884, to the end of the account, was generally for horses let to the defendant during the previous week, and sometimes during the previous month. So far as the evidence discloses every bill presented to the defendant for payment was a bill for a specified time upon which the defendant made his payment. There is no satisfactory evidence in this case that the defendant knew or believed that he owed the plaintiff any account which antedated the middle of April, 1884. If we assume that the defendant had all the horses charged to him on the plaintiff's ledger from April 1st, 1884, to November 15th, 1885, and that he made all the payments credited to him in that ledger, we then have the fact that all the payments were less by more than one hundred dollars than the amount he owed for horses hired during the same period. So that there were no payments within the six years prior to the commencement of the action which are necessarily to be applied upon the whole account existing prior to that time. So far as we can discover, therefore, in this evidence, there is no warrant whatever for finding that the defendant made or intended to make any payment during the six years prior to the commencement of this action to apply upon any account for horse hire existing at an earlier date.

We are not satisfied with the conclusion reached by the

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referee. The case should go back for a new trial, when, if possible, the plaintiff may make such proof as will, within the rules of law above stated, save the whole of his account from the bar of the Statute of Limitations. Upon the record as it now appears he has failed to do that, and the judgment must be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

GEORGE W. CROUCH, Jr., Appellant, v. GUSTAVE MULLER,
Respondent.

A contractor with the owner of land for the erection of a building thereon executed to C., who had furnished materials, an order upon the owner directing him to pay C. a sum specified, and deduct the same from the amount of the contract. In an action to recover the amount of the order, *held*, that the order amounted to an equitable assignment *pro tanto*; but that, in the absence of due prior notice to the owner of the assignment, he was only liable for the amount remaining unpaid on the contract when the action was brought.

Defendant was a German who did not understand English; the order was shown to him and described as a note for him to sign for the amount stated therein. *Held*, that this was not due notice.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made at the October term, 1892, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

This action was brought to recover upon the following instrument:

“ROCHESTER, N. Y., Oct. 18, 1889.

“MR. G. MULLER:

“DEAR SIR.—Please pay to George W. Crouch, Jr., one thousand dollars (\$1,000.00) and deduct the same from the amount of my contract for building your house on Sullivan street.

“J. B. SCHEUCH.”

The complaint alleged, and it appeared, that said order was given to plaintiff in payment for materials furnished, to be used by Scheuch in erecting a house for defendant under a contract between them. The complaint alleged that on the day of the delivery of the instrument it was presented to defendant, notice given him of its contents and payment demanded, but that no payment has been made upon it. Defendant denied the presentation or any notice of the giving of the instrument prior to the last payment on the contract; he admitted that there was still due upon the contract the sum of \$153.90, and this amount, with interest from the completion of the contract, he made an offer to pay. A verdict was directed and rendered for that amount.

Further facts are stated in the opinion.

C. F. Dean for appellant. The order given to plaintiff by contractor Scheuch was properly drawn and did not require acceptance to bind defendant. (*Munger v. Shannon*, 61 N. Y. 251, 257.) After notice of the order, the owner was bound to apply the fund to its payment and to no other purpose. (*Lauer v. Dunn*, 115 N. Y. 405, 409.) Defendant had sufficient notice of the order and his obligations under it to put him on inquiry as to the rights of plaintiff "and he is chargeable with a knowledge of all the facts that an inquiry properly made would have disclosed to him." (*Ellis v. Horsman*, 90 N. Y. 466, 473, 474.) The defendant's daughter was, as interpreter, the accredited agent of the parties, acting within the scope of her authority and in the execution of her agency, and plaintiff could give her answers in evidence. (Phillips on Ev. 519; 1 Greenl. on Ev. [15th ed.] 257, 258, §§ 182, 183.) There was a sufficient question of fact to go to the jury. (*Heermans v. Ellsworth*, 64 N. Y. 159.)

J. W. Taylor for respondent. The plaintiff failed to show that the defendant had knowledge that the plaintiff held an assignment of an interest in the contract price when he paid the amounts due on the contract to Scheuch. (*Brill v. Tuttle*,

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81 N. Y. 457; *Lauer v. Dunn*, 52 Hun, 194.) The plaintiff was bound to prove notice to the defendant of the assignment, in order to protect himself against subsequent payments. (*Heermans v. Ellsworth*, 64 N. Y. 156.)

FINCH, J. The order drawn by the contractor upon the defendant, by its terms and under the circumstances, operated as an equitable assignment of the sum expected to become due upon the owner's contract with the builder. (*Brill v. Tuttle*, 81 N. Y. 457.) There would be no doubt of plaintiff's right to recover the whole of such sum if due notice of the assignment had been given to the drawee; but the trial court and the General Term have concurred in the conclusion that no such notice was given, and have so held as matter of law upon the evidence. It is that ruling which is assailed on this appeal.

If there was no proof except that given by the two persons who presented the order to the defendant it would be easy to uphold the decision made, for the defendant did not understand English, and was not fully or correctly informed of the contents of the paper by Miller, who sought to explain it in German. Both of these persons described it as a paper to be signed by the defendant, and he must necessarily have understood it to be, if not a note, as he testified, at least an order depending for its effect upon his signature and acceptance, and so not an equitable assignment of the fund which could operate without his assent. The agents of the plaintiff, therefore, misled him, and failed to give him the requisite notice. They knew he could not read English, and came prepared for that emergency, but instead of translating the order itself into German they described in that language their own mistaken idea of its legal effect, and instead of leaving the order or a correct copy of it with him, so that he might procure it to be translated into his own language, they took the instrument away and left him with an incorrect understanding of the paper, and without means of correcting it.

But the question becomes closer and more difficult when we

come to the testimony of the defendant himself. He says at first that Babcock said to him, "Here I bring a note of a thousand dollars," which he wants me to sign and I wouldn't do it. He adds, "Babcock read it and Miller translated it into German for me." How Miller translated it he had himself testified, and what the defendant meant by such translation became apparent when he stated in answer to the court what it was that Miller said. His statement was: "Miller said, 'Here I bring a note of a thousand dollars and I want you to sign it.'" So far it is quite clear that no such idea as that of an equitable assignment had been conveyed to the mind of the defendant, or had been understood or comprehended by him, but, on the contrary, the notice was of an order requiring an acceptance and signing by him as essential to its operative force. The trouble arises from what he further said. He testified, "I told Miller I wanted to see my architect and my lawyer. I saw my attorney and my architect both afterwards. I went to the architect and asked, who do I owe the money? Who am I to pay this money to, the contractor or to Crouch?" It is argued that this inquiry of the defendant justifies a possible inference that he knew and understood the true character of the order; that he realized that Crouch in some manner had asserted a claim upon him for the balance to become due, and that for such reason he sought to ascertain to which of the two he ought to make payment: and so a question arose as to the real tenor and effect of the notice which should have been submitted to the jury. The point is somewhat close, but I am inclined to think that the defendant's statement does not change the situation, and is consistent with all that preceded it. The defendant did know, for he had been told, that his contractor had drawn an order upon him which he was asked to accept, and we must assume that he went to his attorney and architect with that statement, and that he understood the order to be an effort to divert his future payments to Crouch; so that his inquiry was whether that effort did or did not make him debtor to Crouch instead of the contractor. He was told it

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did not. If he had not been misled, if a correct description of the order had been given to him, or it had been literally translated into German, or a copy had been given him to take to his advisers, who could read it, his inquiry would have had a different answer. I think the question he asked does not indicate, in opposition to all the other evidence in the case, that the defendant understood the order to be something different from the description given of it, or to be one which transferred the right to the fund, but that, on the contrary, he thought it to be what was described to him, but the effect of which, and the propriety of his refusal to accept it, he thought it prudent to submit to the judgment of his advisers.

I am disposed, therefore, to approve the conclusion of the courts below, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

ALLISON K. HUME, Appellant, v. EDWARD C. RANDALL et al.,
Respondents.

141	499
144	578

141	499
154	427

Where a grantee of a life estate takes also by his deed a power to alien in fee to any person by means of a will, and no person other than the grantee of the power has, by the terms of its creation, any interest in its execution, the power is a general beneficial one.

In an action by the vendor to enforce specific performance of a contract for the purchase and sale of land, plaintiff claimed title under a deed with covenant of warranty, which contained conditions substantially as follows: The grantees shall have an equal interest in the property, and shall control and direct the same after the death of the grantor; upon the death of one of the grantees the other to have such control during life; neither "shall have the right to convey by deed" without the consent of the grantor, but it may be arranged to be disposed of by will by the survivor, or by mutual will of the grantees, to take effect after the death of both. The habendum clause was to the grantees, their "heirs and assigns forever." The grantor was dead at the date of the deed from the grantees to plaintiff. *Held*, that said grantees had power to alien their life estate after the death of their grantor; and so, that their conveyance with warranty conveyed the fee. (1 R. S. 732-733, §§ 81-84.)

Cutting v. Cutting (86 N. Y. 522); *Crooke v. County of Kings* (97 id. 421);

Genet v. Hunt (113 id. 158), distinguished.

Hume v. Randall (65 Hun. 437), reversed.

(Argued February 26, 1894; decided March 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which directed judgment in favor of defendants upon a case submitted under the Code of Civil Procedure (§ 1279).

Plaintiff sought in this controversy to compel defendants to complete a contract entered into by them with him to purchase certain lands in Erie county in this state. Defendants claimed that the title offered by plaintiff was not merchantable.

The facts, so far as material, are stated in the opinion.

Frank F. Williams for appellant. The first question submitted to the court should have been answered in the affirmative. The deed of William S. Van Duzee and wife vested in the grantees the fee absolute of said premises after the death of said Van Duzee and wife in respect to the rights of the purchaser from them, so that the warranty deed of said grantees to the plaintiff conveyed to him the absolute fee of said premises. (*Cutting v. Cutting*, 86 N. Y. 531; *A. B. Society v. Stark*, 45 How. Pr. 160; *Freeborn v. Wagner*, 4 Keyes, 27.) The decision of the General Term would render sections 81, 83 and 84 of the statutes relating to powers absolutely inoperative and of no effect, and is also directly in opposition to the rulings of this court. (*Freeborn v. Wagner*, 2 Abb. Ct. App. Dec. 175; *Crooke v. County of Kings*, 97 N. Y. 421.) The intention of the grantor, William S. Van Duzee, in said deed was to retain for his lifetime a certain control over said premises, and to convey all beneficial interest in and enjoyment of said premises after his death to the grantees, retaining neither for himself nor for his heirs any remainder in said premises, nor any estate whatsoever therein; consequently he conveyed to said grantees the fee of the premises subject to his own control therein during his lifetime. (*Newkirk v. Newkirk*, 2 Caines, 346; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Ozley v. Lane*, 35 N. Y. 340; *Schermerhorn v. Negus*, 1 Den. 448.) In adopting sections 81, 83 and 84, article 3, title 2, chapter 1, part 1 of the Revised Statutes, it was clearly

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the intention of the revisers to cover such a case as the one at bar. (*Crooke v. County of Kings*, 97 N. Y. 421.)

Jesse H. Behrends and *C. M. Bushnell* for respondents. The grantors in the deed in question created by it two successive life estates in their grantees, and during their existence suspended the absolute power of alienation. This they had a statutory right to do, of which right the interpretation of sections 81-85 of the Statute of Powers contended for by plaintiff would deprive them. The intent, too, of the revisers in adopting these sections, did not include a case like the one in question. (*Jackson v. Trowbridge*, 1 Johns. Cas. 91; *Jackson v. Troup*, 16 Johns. 172; *Troup v. Wilson*, 2 Cow. 195; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Riggs v. Palmer*, 115 id. 506, 509, 510; *Smith v. People*, 47 id. 330, 336; *James v. Patten*, 6 id. 9, 13; *Tonnele v. Hall*, 4 id. 140, 144.) The grantor, William S. Van Duzee, did not, in the said deed, retain any estate in the premises whatever, but merely a power in trust, which allowed him to manage the property during his life; and only two life estates in the property were created by his deed. (*Kissam v. Dierkes*, 49 N. Y. 602.) The deed of Sarah A. Cornell and Laura S. Beal to the plaintiff here might be attacked by their subsequent creditors, on the ground that such a deed was beyond their power to execute, and that their life estates, being subject to a condition forbidding their alienation, are subject to the claims of such creditors, thereby putting these defendants to the expense of a lawsuit to maintain their rights. No title should be adjudged merchantable which carries with it a possible lawsuit. (*B. P. Com. v. Armstrong*, 45 N. Y. 235; *Hinckley v. Smith*, 51 id. 21; *Lockman v. Reilly*, 29 Hun, 434; *Argall v. Raynor*, 20 id. 267.) Section 85 of article 3 of title 2 of chapter 1, part 2, Revised Statutes (R. S. [8th ed.] p. 2447), as it follows section 84, modifies it, and sections 81 to 84 do not apply to this case, as the grantees in this case had no power to dispose of the premises in question during their respective lifetimes. (*Cutting v. Cutting*, 86 N. Y. 522;

Crooke v. County of Kings, 97 id. 421; *Genet v. Hunt*, 113 id. 158.)

PECKHAM, J. The sole question arises in this case over the deed from Van Duzee and wife to Sarah A. Cornell and Laura S. Beal. If, under the provisions of that deed, the grantees therein were able, subsequent to the death of Van Duzee, to convey a fee, then the plaintiff took such fee by virtue of a deed from those grantees, and plaintiff's deed tendered to defendants conveyed a good title, and the judgment should be in his favor. Otherwise not.

The case was submitted to the General Term upon an agreed state of facts. The defendants agreed to purchase from plaintiff the premises described in the Van Duzee deed, but now object to complete the purchase on the ground that the plaintiff cannot convey a good title. The Van Duzee deed conveys certain land in Erie county in this state to the above-named grantees, and upon terms and conditions as follows:

"It is hereby intended and understood that the parties of the second part shall both have an equal and undivided interest in the property conveyed above, and said parties shall control and direct said property during their natural life after the decease of William S. Van Duzee, one of the parties of the first part. If one of the parties of the second part should be taken away by death, the other party shall have the control during her natural life after the time mentioned above, but neither party or both shall have the right to convey away this property by deed or other forms during their lives without the written consent of William S. Van Duzee, one of the parties of the first part, but it may be arranged to be disposed of by will by one of the second party who shall survive the the other, or by a mutual will as the parties may agree, which will shall take effect after the death of both parties of the second part mentioned above. Said Van Duzee shall have the full control of said property and its products during his natural life, but the products, interest and issues of said property shall go for the benefit of the parties of the second part.

It being understood that said products, interest and issues shall be equally divided between the parties of the second part, but after the decease of one of the second party the survivor shall have the said rents, products and issues at her use and control. And it is further stipulated that if either of the parties marry mentioned above, then the other party shall have full control and possess the entire premises herein deeded."

The deed contained in the habendum clause following the above language, the words "to have and to hold the said premises as above described with the appurtenances unto the said party of the second part and to ——— heirs and assigns forever." It also contained a covenant of warranty. At the date of the deed from the grantees in the above deed to the plaintiff herein, the grantors Van Duzee were both dead. The General Term held that the Van Duzee deed did not vest in the grantees the fee of the premises even after the deaths of the Van Duzees, and that the grantees could not convey a fee to the plaintiff. It, therefore, ordered judgment in favor of the defendants. The plaintiff appeals here and insists that he took the fee and has a good title, which the defendants should receive and pay for as agreed upon.

We think the General Term erred in the conclusion it arrived at.

It is not disputed that under this deed the grantees took a power to alien in fee by means of a will to any alienee whatever, and that no person other than the grantees of this power had by the terms of its creation any interest in its execution. This constitutes what is termed a general beneficial power. (1 R. S. 732, §§ 77, 79; *Cutting v. Cutting*, 86 N. Y. 522, 531.)

It is claimed by the plaintiff that the grantees also took a life estate which, subsequent to the death of the grantor, Wm. S. Van Duzee, could be aliened, and that by virtue of the provisions of the statute they could convey a fee to purchasers.

The sections referred to are sections 81, 82, 83 and 84 of the article on Powers (1 R. S. 732, 733):

"§ 81. Where an absolute power of disposition, not accom-

panied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

“§ 82. Where a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

“§ 83. In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the property, such grantee shall be entitled to an absolute fee.

“§ 84. Where a general and beneficial power to devise the inheritance shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition within the meaning and subject to the provisions of the three last preceding sections.”

Within the last or 84th section it would seem that the power to convey a fee was granted to those occupying a position such as the grantees in the Van Duzee deed. If it be assumed that the grantees had the right to alien their life estate after the death of Van Duzee as above stated, then there would seem to be no doubt that their deed in this case was a good one. In such case their conveyance with warranty conveyed the fee, and any subsequent attempted execution of the power to devise would be fruitless. (*Freeborn v. Wagner*, 2 Abb. Ct. App. Dec. 175.) The defendants, however, urge that the terms of this deed are such that the grantees had no power to alien their life estate without the consent of Van Duzee, which has never been given, and as he is dead, it never can be, and that the suspension of the power of alienation provided for in the deed was not longer than the statute permits, and hence the case last above cited does not apply nor the provisions of the statute above cited in regard to powers. It is said that if the tenant for life have no power to alien it is

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immaterial whether the lack of power comes from the terms of the instrument creating the estate by reason of which the grantee, although clothed with the legal title, is prevented from making it the subject of alienation, or because the legal title is in a trustee, and the life tenant, so to speak, is only the beneficiary. It is urged that in neither case can the statute apply and no fee can be conveyed to a purchaser.

The cases cited by defendants' counsel are *Cutting v. Cutting* (86 N. Y. 522); *Crooke v. County of Kings* (97 id. 421), and *Genet v. Hunt* (113 id. 158). These are cases where the legal title was in the trustee and they are the foundation for the claim that where the tenant for life has no power to alien his life estate the case does not come within the above statute, although the tenant may have a power to dispose of the fee by will. The argument is founded upon the assumption that the life tenant has no power to alien his life interest. If he have that power the argument is inapplicable.

Upon a careful examination of the language of this deed we are convinced that the grantees after the death of William S. Van Duzee had power to alien their life estate. The deed said that neither party or both should have the right to convey by deed or other forms during their lives without the consent of Van Duzee, but it also provided that after his death the parties (grantees) should control and direct the property during their natural lives. Looking at the whole language of the deed we are persuaded the grantees had the power subsequent to the death of Van Duzee to convey their life estate, and that power joined to the power to alien by will in fee, gave them power to convey a fee to a purchaser by their warranty deed.

The plaintiff, therefore, took a good title from the grantees in the Van Duzee deed and tendered a good one to defendants.

Upon this construction of the deed, it becomes clear that the judgment of the General Term should be reversed, and judgment ordered for the plaintiff, with costs.

All concur.

Judgment accordingly.

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WILLIAM H. THOMAS, Respondent, v. WILLIAM B. GAGE,
Appellant.

The silence of one to whom a letter is written, when there is no duty to speak, does not operate as an admission of the facts stated in the letter. T. & M., plaintiff's assignors, and defendant entered into a contract by the terms of which the former agreed to make a monument for the latter, who, the contract stated, "is to inspect the model when made in clay, and it is to be made to his entire satisfaction." In an action for an alleged breach of the contract, plaintiff gave evidence to the effect that defendant inspected the model when finished and expressed his entire satisfaction therewith. This was denied by defendant, who testified that, on the contrary, he expressed dissatisfaction, specifying various defects and objections. Plaintiff was permitted, against the objection of defendant, to read in evidence a letter from M. to defendant which, among other things, stated in substance that the model had been on exhibition in the studio of T. & M. for about a month, and that hundreds of visitors, professional and business men and women, unanimously commended it; this was followed by a statement of what various persons, who were named, had said upon the subject. *Held*, that the admission of the letter in evidence was error, requiring a reversal of the judgment.

(Argued February 27, 1894; decided March 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 2, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles S. Lester for appellant. The court erred in admitting in evidence the letter of John L. Miller, assignor of the plaintiff, dated June 6, 1890. (*Stephens v. Vroman*, 16 N. Y. 381; *Learned v. Tillotson*, 97 id. 1; *Fairlie v. Denton*, 3 C. & P. 103; *Waring v. U. S. T. Co.*, 4 Daly, 233; *Robinson v. F. R. R. Co.*, 7 Gray, 92; *Simpson v. Watrus*, 3 Hill, 619; *Nickerson v. Ruger*, 76 N. Y. 279, 283; *Worrall*

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v. *Parmelee*, 1 id. 519.) A defendant should not lose the benefit of an exception because after an adverse ruling he goes on with the witness and seeks ineffectually to make a case. He does not thereby waive the exception. (*Ward v. W. Ins. Co.*, 6 Bosw. 229; *Holten v. Holten*, 5 Wkly. Dig. 14.)

John A. Foley for respondent. It was proper for either party to read the letter of August sixteenth. (*Nunn v. Reitzenthaler*, 18 Wkly. Dig. 114; *Trischet v. H. Ins. Co.*, 14 Gray, 456; *Grattan v. M. Ins. Co.*, 92 N. Y. 274.) Plaintiff having introduced defendant's letter dated August twenty-first, and defendant having read a portion of plaintiff's dated June thirteenth and his own dated June sixteenth, it was proper for plaintiff to read the whole correspondence. (*Nunn v. Reitzenthaler*, 18 Wkly. Dig. 114; *Strong v. Strong*, 1 Abb. [N. S.] 233; *Trischet v. H. Ins. Co.*, 14 Gray, 456; *McCall v. Moschcowitz*, 10 Civ. Pro. Rep. 107; *Learned v. Tillotson*, 97 N. Y. 1.) The time of performance mentioned in contract, "by July 1, 1890, or as near thereafter as possible," gave plaintiff a reasonable time for performance, due regard being had to his means, engagements, etc. (2 Pars. on Cont. 498.) It was the proper measure of damages to take from the contract price of \$4,485 the value of the material on hand at the time of rescission and what it would cost to complete and erect the monument. (Sedg. on Dam. 223; 40 N. Y. 422; 63 id. 8; 4 id. 338; 89 id. 36, 45; 7 Hill, 61.)

ANDREWS, Ch. J. By the written contract of January 20th, 1890, for an alleged breach of which the action is brought, the firm of Thomas & Miller were to make and erect for the defendant a monument to be placed in the cemetery grounds in Saratoga Springs, according to a design of the "Arger-signer" monument, of which a photograph was furnished by Thomas & Miller to the defendant. The contract contained this provision: "Mr. Gage is to inspect model when made in clay, and it is to be made to his entire satisfaction." Thomas & Miller made a clay model of the monument, and in April, 1890, the

defendant went to Quincy, Mass., to inspect it. The case turned at the trial on the interview between the parties on this occasion. The plaintiff (assignee of Thomas & Miller) gave evidence tending to show that the defendant then expressed his satisfaction with the work and accepted the model as conforming to the contract. This evidence was contradicted by the defendant, who testified in substance that on that occasion he found fault with the model as not conforming to the "Argersigner" statue, and declared his dissatisfaction, and specified various defects and objections. It was conceded on the trial that unless the model was made to the satisfaction of the defendant the plaintiff could not recover. The jury found a verdict for the plaintiff. They must, therefore, have credited the version given by the plaintiff's witnesses of the interview between the parties in April, 1890, there being no other proof from which it could be found that the model had been accepted by the defendant. Subsequent to the interview in April, there was a correspondence running through several weeks between the parties relating to the monument. The last letter, written by the defendant under date of Aug. 21, 1890, contained a declaration that he rescinded the contract because the work was unsatisfactory, and he therein notified Thomas & Miller to proceed no further. This letter was introduced by the plaintiff and read without objection. It appears from the testimony of Mr. Thomas, one of the firm, that on or about the 1st day of June, 1890, the defendant in a conversation with him at Saratoga Springs, informed him that he was "dissatisfied with everything," and stated that a photograph of the plaster cast of the model which had been sent him was a clumsy imitation of the "Argersigner" statue.

The plaintiff was permitted, against the objection and exception of the defendant, to read in evidence a letter dated June 6, 1890, written by Mr. Miller, of the firm of Thomas & Miller, from Quincy, Mass., to the defendant at Saratoga Springs, which commences with the statement that "Mr. Thomas, my partner, writes me that you did not like the photograph of the model, and you thought it a clumsy imitation of the 'Argersig-

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ner' statue, and that you wanted us to hunt up the artist that made the 'Argersigner' model and have him make a new one." The writer then proceeds to speak of Mr. Muer's (the modeler's) ability as an artist, and of other work which he had done which had been highly commended by a person named, a student of art. The letter then states that the model in question was made by Mr. Muer, and asks, "if you were not satisfied when you were here why did you not say so," and the letter then, among other things, says: "The fact is, Mr. Gage, this figure has been on exhibition in our studio for about a month, and there have been hundreds of visitors to see it, doctors, merchants, newspaper reporters, granite contractors, and ladies from all sections of the state, and it has been the unanimous expression that it is the best that has been made in Quincy," and then follows a statement of what certain individuals, naming them, said, concluding as follows: "Mr. Bussell, one of our local artists, said, 'there can be no fault found with it.' These are but a few of the comments by disinterested parties," etc. The letter was objected to generally as incompetent on the ground that it was a statement by the witness in his own favor, and special objection was taken to the statements therein of the declarations of other persons, and to each paragraph therein. The admission of this letter was error. It was not an answer to any letter of the defendant. The issue was, whether the defendant had, in April, 1890, expressed himself satisfied with, and had accepted the model as a compliance with the contract. If the declarations in the letter to the effect that the defendant, in April, had expressed himself satisfied might be considered as a reply to the oral statement made by the defendant to the partner of the writer, that he had always been dissatisfied, the recapitulation in the letter of declarations of third persons as to the merit of the model, had no relation to anything said in that conversation. These opinions did not bear upon the issue being tried, viz., whether the defendant, in April, had declared himself satisfied, but they were calculated to prejudice the jury. The minds of the jury would naturally be

diverted from the real issue, and they might well be inclined to discredit the evidence of the defendant where so many competent judges had declared that the work was of the highest merit. They would, at least, regard the objections made by the defendant to the work as captious and unreasonable. The evidence was hearsay and inadmissible under the plain rules of evidence. By admitting the letter the plaintiff was allowed to put in evidence his own declaration of what third persons had said, and this too on a matter not material to the issue, which was as to the personal satisfaction of the defendant with the model. The letter was not competent as tending to show an acquiescence by the defendant in the opinions of third persons stated therein. He was under no obligation to deny the assertions made. One to whom a letter is written may remain silent when there is no duty to speak, and in such case silence does not operate as an admission of the matters to which the letter relates. The cases of *Learned v. Tillotson* (97 N. Y. 1) and *Bank, etc., v. Delafield* (126 id. 418) are quite applicable here.

The error in the admission of the letter of June 6, 1890, requires a reversal of the judgment. The other exceptions need not be considered, as on a new trial the questions raised thereby may not be again presented.

Judgment reversed and a new trial ordered.

All concur.

Judgment reversed.

GEORGE H. W. CURTIS, Appellant, v. THE WHEELER AND
WILSON MANUFACTURING COMPANY, Respondent.

Where, on trial at Circuit, a verdict is directed by the court, and exceptions are ordered to be heard in the first instance at General Term, an appeal from the judgment brings up nothing for review except questions presented by the exceptions, and so, where the direction of the verdict is not excepted to, the question as to its propriety may not be considered on the appeal.

Purchase v. Matteson (25 N. Y. 211), distinguished.

(Argued February 28, 1894; decided March 13, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 29, 1892, which overruled plaintiff's exceptions and directed judgment in favor of defendant upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Howard A. Sperry for appellant. The court at the trial of this action directed a verdict for the defendant, although the evidence was conflicting, with exceptions to be heard in the first instance at the General Term, and that court, after hearing the exceptions, directed a judgment for the defendant; this was error. (*Purchase v. Matteson*, 25 N. Y. 211; Code Civ. Pro. §§ 1000, 1336.) Plaintiff urges that, even if the jury found a verdict against him, the exceptions to the evidence would have warranted a new trial. (*Huntingdon v. Clafin*, 38 N. Y. 183; *Cuff v. Dowland*, 57 id. 565.)

Miron Winslow for respondent. The defendant set up as an affirmative defense an agreement subsequent to the date of the contract by the plaintiff, by which the plaintiff agreed for certain considerations to release his alleged claim under his alleged contract, which claim was disputed by the defendant. The rule that settlement for a less sum, after debt is due, is not

good by way of accord and satisfaction, does not apply where the claim is disputed. (*People ex rel. v. Buffalo Asylum*, 96 N. Y. 640; *Jeffray v. Davis*, 124 id. 164.) There was no error in the direction by the court to the jury to find a verdict for the defendant. (*Herring v. Hoppock*, 15 N. Y. 409, 413; *Wild v. H. R. R. Co.*, 24 id. 433; *Corning v. T. I. & N. Factory*, 44 id. 577, 594; *Neuendorff v. W. M. L. Ins. Co.*, 69 id. 388, 393; *Dwight v. G. L. Ins. Co.*, 103 id. 359; *Lovell Co. v. Houghton*, 116 id. 529; *Bulger v. Rosa*, 119 id. 464; *Wylde v. N. R. R. Co.*, 53 id. 156; *Bruce v. Kelly*, 7 J. & S. 27; *Lynch v. Pyne*, 10 id. 11; *Kehr v. Stauff*, 12 Daly, 115, 117; *Molloy v. N. Y. C. R. R. Co.*, 10 id. 453; *Boyd v. Colt*, 20 How. Pr. 384; *T. M. Co. v. Foster*, 51 Barb. 346, 351; 41 N. Y. 620; *Baulec v. N. Y. & H. R. R. Co.*, 59 id. 356.) No exception appears to have been taken by the plaintiff to the ruling of the court directing a verdict for the defendant; consequently the plaintiff is not in a position to raise the question upon appeal whether such ruling was erroneous. (*Emmons v. Wheeler*, 3 Hun, 545; *People v. Buddensieck*, 103 N. Y. 501; *Briggs v. Waldron*, 83 id. 582, 586; *Hamilton v. T. A. R. R. Co.*, 53 id. 27; *S. O. Co. v. A. Ins. Co.*, 79 id. 506, 510; *Duryea v. Vosburgh*, 121 id. 57, 62; *Schwinger v. Raymond*, 105 id. 648.)

EARL, J. The plaintiff sought in this action to recover from the defendant the balance alleged to be due to him for the purchase price of a patent sold and assigned by him to it. The allegations of the complaint are put in issue by the answer, and the defendant also alleged a counterclaim for which it prayed judgment. The action has been twice tried. Upon the first trial the plaintiff recovered a verdict, and upon appeal to the General Term from the judgment entered thereon the court reversed the judgment, and granted a new trial, on the ground that the verdict of the jury was against the weight of evidence. The cause came to trial a second time, and during the progress of the trial the plaintiff took several exceptions to the rulings of the trial judge upon questions of

evidence. At the close of all the evidence the counsel for the defendant requested the court to direct a verdict in its favor for the amount of its counterclaim, and such a verdict was directed. The plaintiff took no exception to the direction of the verdict, and the court ordered the exceptions (there being none except those above mentioned) to be heard in the first instance at the General Term, and judgment was ordered for the defendant upon the verdict, and this appeal is from that judgment.

We have considered the exceptions taken by the plaintiff during the progress of the trial, and it is very clear that none of them point out any error, and, indeed, none of the exceptions were orally argued before us.

The sole contention of the plaintiff's counsel upon the argument was that a verdict ought not to have been directed, and that the case should have been submitted to the jury. There is no exception which presents that question for our consideration. The plaintiff acquiesced in the direction of a verdict. If the evidence was conflicting and the plaintiff claimed that he had made a case for the consideration of the jury he should have taken an exception to the direction of a verdict. He strenuously contends, however, that his position is the same as if he had taken an exception to the direction of the verdict, and calls our attention to the case of *Purchase v. Matteson* (25 N. Y. 211), as an authority for his contention. That case bears no analogy to this, and is not an authority here. There the court directed a verdict subject to the opinion of the court at General Term, and the practice there pointed out is applicable to such a case. Here no verdict was directed subject to the opinion of the court. The direction of the verdict was absolute, and the exceptions were ordered to be heard in the first instance at the General Term. In such a case nothing is before the General Term but the exceptions taken upon the trial, and as those exceptions were not well taken the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

BENJAMIN F. GERDING, Respondent, v. JOHN B. HASKIN et al.,
Appellants.

A real estate broker, in order to recover compensation for service as such, must prove that he found a purchaser and produced him to his principal, who was ready and willing to purchase the real estate of the latter upon his terms. The principal is entitled to know the name of the proposed purchaser, and so long as there is an uncertainty in this regard the broker is not entitled to compensation.

In an action by such a broker to recover commissions, the evidence presented on behalf of plaintiff was to the effect that he went to defendants with L., who was engaged in forming a syndicate to purchase the land; that L. offered, on behalf of the syndicate, to purchase at defendants' price, giving names of persons who had then consented to join the syndicate, but before the syndicate was fully formed defendants sold the land to other parties. *Held*, that plaintiff failed to show performance of his contract; and that a refusal to nonsuit was error.

(Argued March 5, 1894; decided March 13, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 4, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

This action was brought by the plaintiff to recover his compensation as a broker under the employment of the defendants to find for them a purchaser of their real estate situated in the city of New York.

Defendants put in issue the material allegations of the complaint. Upon the trial plaintiff gave evidence tending to show his employment, the amount of his compensation and what he claimed to be performance of his contract. As to the performance, the only evidence for the plaintiff was that of himself and one Lewis. He testified that after his employment he went to Haskin's house and told him that he had a buyer for the property at his price,

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\$110,000, and asked him how much he required to be paid on the contract; that Haskin replied, \$25,000 on the delivery of the deed, \$5,000 on the signing of the contract; that the next day he again went to Haskin's house with Lewis and introduced Lewis to him and told him "he was the gentleman who represented the buyers; that Mr. Haskin said 'all right,' and wanted to know the names of the buyers," and he gave him the names and he entered them in a memorandum book; that Mr. Lewis then told Haskin that he had \$250 in his pocket and took it out, which he said he would pay to him and take a receipt, and that any time he named he would draw the contract and pay him the balance of the \$5,000, the deed to be delivered on the first of November; that Mr. Haskin expressed satisfaction with the persons named as buyers; that no one was present but himself and Lewis and Haskin, and that in his interview with Haskin he named eight persons as proposed purchasers of the real estate. It appears by his cross-examination that he was required to give a bill of particulars in this action, and that one of the persons named to Haskin as a buyer was not named in the bill of particulars, and that another one who was not named to Haskin was specified in the bill of particulars. Lewis testified that at the interview mentioned he told Haskin he had a "syndicate which were willing to pay the \$110,000," and that he "had \$250 in cash and took the money out and offered it to him to pay a deposit and take his receipt for the same," which Haskin, for reasons stated, declined then to take; that Haskin asked him "who the syndicate was;" that "I gave him some of the names of the syndicate that we had at that time; I don't think the syndicate was full when I went there," and that then he gave the names of the persons who had then joined the syndicate, one of whom, at least, was not among the names mentioned by the plaintiff in his evidence. He testified further: "When I heard that the property was for sale we started in to form a syndicate to purchase it, and I got these gentlemen together, part of them, not all of them, on a Saturday evening in our office, and submitted the offer of

\$110,000; at least, submitted the price of \$110,000 for the property. There was nothing paid in. Each one assented to subscribe for one share. They authorized me to go to Haskin and offer him \$110,000 for the property, and to pay \$250 on the contract, or on the purchase of the property, and if Mr. Haskin wished any more money to call on Mr. Martin Walter and he would supply it. I was to draw on Mr. Walter for the \$5,000." He also testified that he was a member of the syndicate; that he furnished the \$250 which was offered to Haskin, and that no one else put up any money, and the list of proposed purchasers testified to by him differed materially from the list of names specified as purchasers by the plaintiff.

The defendants, testifying on their own behalf, denied the employment, the agreement for compensation and the performance of the contract by the plaintiff.

At the close of the plaintiff's evidence the defendants moved to dismiss the complaint, specifying no grounds, and their motion was denied. At the close of all the evidence on both sides they again moved for the dismissal of the complaint and for the direction of a verdict in their favor, specifying no grounds for their motions, and the motions were denied.

The evidence was then submitted to the jury and they found for the plaintiff, and from the judgment in his favor the defendants appealed to the General Term and to this court.

Isaac H. Maynard for appellants. The exception to the refusal of the court to direct a verdict for the defendants brings up for review the question whether, upon all the evidence in the case, the plaintiff was entitled to recover or had established his cause of action. (*Appleby v. F. Ins. Co.*, 54 N. Y. 253; *Schwinger v. Raymond*, 105 id. 648; *Hemmens v. Nelson*, 138 id. 517; *Peake v. Bell*, 7 Hun, 454; *Hamilton v. T. A. R. R. Co.*, 13 Abb. [N. S.] 318.) The minds of the parties never met as to the terms of sale: (*Susdorf v. Schmidt*, 55 N. Y. 95; *Sibbald v. B. F. Co.*, 83 id. 378;

Vreeland v. Velterlein, 33 N. J. L. 247; *McGavock v. Woodlief*, 20 How. Pr. 221; *Stillman v. Fitzgerald*, 37 Minn. 186.) The pretended purchasers were never produced to the vendors for their acceptance, and until that is done the broker is not entitled to commissions. (Rapalje on Real Est. § 72; *Hayden v. Giullo*, 35 Mo. App. 647; *Pratt v. Patterson*, 7 Phila. 135; *Coleman v. Garrigue*, 18 Barb. 60; *Martin v. Bliss*, 57 Hun, 159; *Wylie v. M. Bank*, 61 N. Y. 416.) The plaintiff never produced any purchaser to the defendant Tappen, and as to him made no proof of the performance of his contract of service as broker, which would entitle him to recover. (4 Kent's Comm. 367, 368; *Blood v. Goodrich*, 9 Wend. 68; *Foster v. Eager*, 2 Lans. 182; *Loomis v. Supra.*, 6 id. 269; *Yates v. Andrews*, 37 N. Y. 657; *Morlock v. Butler*, 10 Ves. 111.) The plaintiff failed to prove that the purchasers produced were of sufficient ability to perform the proposed agreement for purchase and to pay for the property. The purchaser must be shown to be able to perform or commissions are not earned. (Rapalje on Real Est. § 72; *Duclos v. Cunningham*, 102 N. Y. 678; *Barnard v. Monnott*, 1 Abb. Ct. App. Dec. 108; 33 How. 140; 3 Keyes, 203; *Everhart v. Searle*, 74 Penn. St. 256; *Iselin v. Griffith*, 26 Iowa, 648.) The plaintiff cannot recover commissions because it appears from his own testimony that he was acting as the agent of the proposed purchasers. (*Duryee v. Lester*, 75 N. Y. 442; *Dunlap v. Richards*, 2 E. D. Smith, 181; *Pierce v. Thomas*, 4 id. 354; *Cassard v. Hinman*, 6 Bosw. 8; *Rice v. Wood*, 113 Mass. 133; *Gordon v. Clapp*, Id. 335; *Bell v. McConnell*, 37 Ohio St. 396; *Lynch v. Fallon*, 11 R. I. 311; *Connelly v. Smith*, 142 Penn. St. 25.)

Abel Crook for appellants. Each tenant in common could convey or contract to convey only his own share. The employment of plaintiff as broker by one defendant does not bind the other defendant. Hence, if either party is held not liable for commissions, and the other is held liable, the verdict is excessive and should be reduced one-half. (*Van Doren*

v. *Balty*, 11 Hun, 241; *Bowman v. Travis*, 54 N. Y. 640; *McLean v. McLean*, 96 id. 655; *Tuers v. Tuers*, 100 id. 200.) To entitle the plaintiff to commissions as broker he must have established by competent proof employment by the defendants to effect a sale of the property upon certain specified terms; that he has found a purchaser of sufficient responsibility who is willing to take the property upon the terms named. (*Duclos v. Cunningham*, 102 N. Y. 678.) Upon the testimony of plaintiff and his witness Eickwort it is clear that the transaction, so far as Tappen is concerned, was not a general employment of plaintiff as a broker to sell the property, but an unsuccessful attempt on the part of plaintiff to buy the property for Eickwort, the parties not agreeing upon the price, but Tappen promising to pay a commission if the particular sale then under negotiation should be consummated with Haskin's consent. No valid performance was shown. No *bona fide* purchaser on Haskin's terms was secured. At most it was a tentative affair, not an accomplished fact. (*Condict v. Cowdrey*, 139 N. Y. 273.) The exception to defendants' motion to direct a verdict for the defendants was well taken, and the motion for a new trial on the minutes should have been granted. Plaintiff, as matter of law upon the undisputed evidence, ought not to have recovered, and should have been nonsuited. (*Kaare v. T. S. & I. Co.*, 139 N. Y. 369; *Sickles v. Flanagan*, 79 id. 224.)

C. Bainbridge Smith for respondent. The broker earns his commission when he procures a person able and willing to purchase on his employer's terms. (*Stillman v. Mitchell*, 2 Robt. 523; *Barnard v. Mannot*, 3 Keyes, 203; 33 How. Pr. 440; *Levy v. Coogan*, 30 N. Y. S. R. 553; *Duclos v. Cunningham*, 102 N. Y. 678.) The ability of the person who is willing to buy will be presumed in the absence of evidence to the contrary. (*Hart v. Hoffman*, 44 How. Pr. 168.) The case does not contain a certificate that all the evidence is before the court, and in the absence of such a certificate the court will not review disputed questions of fact. (*Levi v.*

Marshall, 30 N. Y. S. R. 283; *Porter v. Penn*, 107 N. Y. 531.) The counsel for the defendants requested the court to charge the jury "that if the jury shall accept the testimony of Judge Tappen that no commissions should be paid until the deed actually passed that no verdict can be rendered for the plaintiff." This was properly refused. (*McGrath v. M. L. Ins. Co.*, 6 N. Y. S. R. 376; *Dolan v. D. & H. C. Co.*, 71 N. Y. 285.)

EARL, J. Before a real estate broker can recover his compensation, he is bound to prove that he found a purchaser and produced him to his principal, ready and willing to purchase the real estate upon his terms. (*Rapalje on Real Estate Bro.* § 72; *Coleman v. Garrigues*, 18 Barb. 60; *Martin v. Bliss*, 57 Hun, 159; *Wylie v. Marine Bank*, 61 N. Y. 416.)

It is contended on behalf of the defendants, that the plaintiff utterly failed to show that he produced any purchaser to the defendants, ready and willing to enter into contract with them. They were entitled to know who the proposed purchasers were, and with whom they were expected to enter into contract; and so long as there was uncertainty as to the purchasers, the plaintiff could not claim performance of his contract and demand his compensation.

Now, from the evidence furnished by the plaintiff, who can we say were the purchasers? It is impossible to say from his evidence. Although he furnished certain names to Haskin as the purchasers, yet when he came to furnish his bill of particulars he omitted one of those names and inserted another. The names of the members of the purchasing syndicate as given by Lewis differed materially from those given by the plaintiff, to Haskin at the time of the interview with him; and Lewis testified that the syndicate was not full; and, therefore, the persons who were to make the purchase were not then known. He was then forming a syndicate for the purchase of the property, and he got a portion of the persons he named together in his office, and each one of them consented to subscribe for one share. But it does not appear what proportion

of the property or of the purchase price constituted one share. The whole matter seems to have been incomplete, nebulous and uncertain. Neither the plaintiff nor Lewis knew who the purchasers were really to be, and they did not produce them to Haskin or name to him who they were. Before the syndicate of purchasers was fully formed the defendants sold the real estate to another person, and that ended their relations with the plaintiff. (*Sussdorff v. Schmidt*, 55 N. Y. 319; *Wylie v. Marine Natl. Bank*, 61 id. 415; *Sibbald v. Bethlehem Iron Co.*, 83 id. 378.)

Therefore, without examining other objections made to the plaintiff's recovery, we think he utterly failed to show that he had performed his contract, and hence he should have been nonsuited at the trial.

It is now claimed, however, that the motions for a dismissal of the complaint and for the direction of a verdict were ineffectual, and are not now available to the defendants because no grounds for the motions were stated. A motion to direct a verdict for the defendant is in substance a motion for a nonsuit, and must be governed by the same rules. (*Bissel v. Campbell*, 54 N. Y. 353.) It is undoubtedly the general rule that a motion for a nonsuit is ineffectual unless the grounds upon which it is based are specified. The defect in the plaintiff's case should be pointed out, so that he may supply it, if he can. (*Booth v. Bunce*, 31 N. Y. 246; *Binsse v. Wood*, 37 id. 526; *Thayer v. Marsh*, 75 id. 340; *Sterrett v. Third Natl. Bank of Buffalo*, 122 id. 659; *Quinlan v. Welch*, 141 id. 458.) So much is required by good faith and fair practice, and so much is due to the orderly administration of justice. But where no grounds are specified for a nonsuit, the motion is sufficient if it be apparent that the objection made to the plaintiff's recovery could not have been obviated if it had been particularly specified. To such a case the rule does not apply, as the plaintiff suffers no harm and is not misled because the grounds were not particularly brought to his attention or to the attention of the court. In a case like this, we think, the motion

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to nonsuit without specifying grounds should be held effectual. The plaintiff was a witness on his own behalf, and we must assume that he gave all the evidence he could. He assumed to state the whole transaction between himself and Haskin, and we cannot assume that if the ground for a nonsuit now relied upon had been stated he could have changed his evidence. Lewis seems to have been the principal mover in forming the syndicate of purchasers, and he testified fully about that matter, and about the interview which took place with Haskin. He said that the syndicate was not complete; that really all the purchasers were not known and could not be known at the time of the only interview had with Haskin. It cannot be assumed that his evidence could have been fuller, more certain or more favorable to the plaintiff. We cannot, therefore, see how the plaintiff could honestly, fairly or truthfully have made any better case for a recovery if his attention had been called to the ground for a nonsuit now relied upon.

Therefore, as the plaintiff wholly failed to show performance of the contract on his part within the rules of law applicable to such a case, he should have been nonsuited; and the judgment must, therefore, be reversed, and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

141	521
160	860

ABRAHAM D. COVERT, Respondent, *v.* JOHN P. CRANFORD
et al., Appellants.

One who does an act, lawful in itself, upon the land of another, under the authority of the owner, is not liable in damages to the proprietor of adjoining lands for consequential injuries remotely resulting from the act, not naturally to be anticipated and flowing from occult causes which could only be conjectured by men of science, or disclosed by actual experience.

Defendants, under and pursuant to a contract with the city of Brooklyn, laid a conduit on lands belonging to the city. The conduit line crossed

a stream which supplied a pond on plaintiff's premises that furnished water power for his mill. In building the conduit across the stream the water was temporarily diverted. After the work was completed and the bed of the stream restored to its original state, the water passed by underground drainage through the earth into the channel or trench dug for the conduit, and so plaintiff's pond was substantially drained and his water power destroyed. In an action to recover damages, *held*, that defendants were liable for damages sustained by plaintiff caused by the interruption of the flow of the stream during the time they were engaged in constructing the conduit across it; but were not liable for the subsequent injury caused by the conduit; that for this the city, the owner of the land, that directed the construction of the conduit, was alone liable.

(Argued March 1, 1894; decided March 18, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries to a pond belonging to plaintiff, alleged to have been caused by excavations made by defendants in the construction of an aqueduct.

The facts, so far as material, are stated in the opinion.

Jesse Johnson for appellant. The defendants never were liable so long as they properly performed their contract, except for injuries that resulted from their negligence or their inefficiency. (*Mayor, etc., v. Cunliff*, 2 N. Y. 165.) There is nothing to show that the plaintiff suffered any actionable loss during the time the defendants were engaged in the construction of the aqueduct across the valley of James brook. (*Bloodgood v. Ayres*, 108 N. Y. 400; *Village of Delhi v. Youmans*, 45 id. 362; *Pixley v. Clark*, 35 id. 527; *Van Wycklen v. City of Brooklyn*, 118 id. 427; *Washb. on Eas.* [4th ed.] 210, 363; *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tut-hill*, 29 N. Y. 466; *Queen v. Met. Board*, 3 B. & S. 710.) The defendants clearly were not liable for any loss of rental

or injury to the plaintiff after they had completed the work on the portion of the conduit line affecting the mill and water privileges of the plaintiff. (*Hause v. Cowing*, 1 Lans. 288; *Swords v. Edgar*, 59 N. Y. 28; *Walsh v. Meade*, 8 Hun, 384, 391; *Wolf v. Kilpatrick*, 101 N. Y. 146; *Mayor, etc., v. Cunliff*, 2 id. 165; *Brown v. C. & S. R. R. Co.*, 12 id. 486; *People v. Livingstone*, 27 Hun, 105; *Pappenheim v. M. E. R. Co.*, 128 N. Y. 436; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98, 109; *Tallman v. M. E. R. Co.*, 121 id. 119; *Whitmore v. Bischoff*, 5 Hun, 176; *Colrick v. Swinburne*, 105 N. Y. 503; *Durvey v. Mayor, etc.*, 26 Hun, 120; *Matthews v. D. & H. C. Co.*, 20 id. 427.)

Benjamin W. Downing for respondent. The exception taken to the refusal of the court to charge as requested by defendants' counsel, "That the plaintiff has a full and complete remedy against the city of Brooklyn," was not well taken. (*Crocher v. Bragg*, 10 Wend. 260; *Arnold v. Foote*, 12 id. 330.) The exception to the refusal of the court to charge, "That the defendants were only liable in this action for such damage as was suffered by the plaintiff down to the time the defendants were shown to have finished the work on that portion of the conduit affecting the property of the plaintiff," was not well taken. (*Matthews v. D. & H. C. Co.*, 27 Hun, 427; *Atkins v. Boardman*, 2 Metc. 457; *Bliss v. Greeley*, 45 N. Y. 671.) The diversion of the water of the plaintiff's pond by the digging and building of the conduit was a legal injury for which the plaintiff is entitled to compensation and damages. (*Garwood v. N. Y. C. & H. R. R. Co.*, 17 Hun, 356; *Clinton v. Meyers*, 46 N. Y. 511; *Galway v. M. R. R. Co.*, 128 id. 133.) The proposition that that the defendants were liable, if liable at all, for the rental value of the plaintiff's property to the time of the commencement of this action is a clear and undisputed proposition of law. (*Pappenheim v. M. E. R. R. Co.*, 128 N. Y. 444; *Uline v. N. Y. C. & H. R. R. R. Co.*, 101 id. 116; *Plate v. N. Y. C. & H. R. R. R. Co.*, 37 id. 472.)

ANDREWS, Ch. J. The defendants in the year 1890, under a contract with the city of Brooklyn, constructed a conduit running in an easterly and westerly direction, connecting certain ponds at Massapequa, Long Island, with the Ridgewood reservoir, in aid of the water supply of the city. The conduit line crossed the valley of James brook, a small stream running northerly and southerly, which supplied a pond of the plaintiff on his premises about a mile below the point where the conduit crossed the stream, which furnished the water power for a small mill on the plaintiff's land, which had existed there for more than fifty years. The defendants excavated a trench for the conduit from twelve to twenty-two feet in depth. The evidence tends to show that as the excavation approached the channel of the stream the water in the plaintiff's pond began to lower, and that since its completion the pond has been substantially drained so as to destroy the water power, and the plaintiff has suffered a serious injury. In building the conduit across the stream the water was temporarily diverted from the channel. But after the conduit was covered and the bed of the stream at the point of crossing was restored to its original state, the pond as has been stated did not retain the water flowing thereto, and the evidence justifies the inference that the water of the pond passed by underground drainage through the earth into the channel of the conduit and was thus lost to the plaintiff. It has been held that such an injury is actionable. In *Dickinson v. Canal Co.* (7 Exch. 282) the defendant sunk a well on its premises and pumped therefrom large quantities of water to supply its canal, whereby water that had already reached a surface stream was diverted by percolation from the plaintiff's dam, and the court decided that an action for damages would lie. In the case of *Van Wycklen v. City of Brooklyn* (118 N. Y. 427) the Second Division of this court assumed, if it did not decide, that the same principle applied in the case of driven wells which sucked away the waters from a running stream after they had been collected therein. It is not necessary in this case to consider whether there are qualifications of this rule.

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(See remarks of POLLOCK, C. B., in *Dickinson v. Canal Co.*, and opinion of Lord WENSLEYDALE in *Chasemore v. Richards*, 7 H. of L. Cases, 380.) The point here is whether the defendants, the contractors for building the conduit, are liable to the plaintiff.

It is conceded that the conduit was laid upon the lands of the city of Brooklyn under a contract with the city. The contract is not in evidence, but the court on the trial ruled, upon the request of the defendants, that the jury could not infer that the conduit was constructed contrary to the terms of the contract. The plaintiff acquiesced in this ruling, and the fact inferrible from the evidence is that the defendants in constructing the conduit, and in the manner of executing the work, were complying with their contract with the city. We think the defendants are liable for any injury sustained by the plaintiff, resulting from the actual interruption of the flowing of the stream during the time they were engaged in constructing the conduit across it. It was a patent violation of the property rights of the lower proprietors, not justified by any necessity so far as the record shows. The maxim *aqua currit et debet currere*, says DENIO, J., in *Bellinger v. N. Y. C. R. R. Co.* (23 N. Y. 42), "absolutely prohibits all individuals from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretense, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care." In constructing the conduit the defendants were not mere servants or laborers. They doubtless had a discretion and could exercise an independent judgment in the method by which the conduit should be carried under the bed of the stream. They knew, or were bound to know, that they had no right to cut off the flow of water in the stream as against riparian owners below. A wrongdoer cannot interpose the direction of another to excuse a plain and palpable wrong. But the injury sustained during the temporary interruption of the flow of the stream, while the conduit was being laid across it, is comparatively of small

moment. The main question is whether the contractors are liable for the injury caused by the conduit in draining the pond in the manner before stated. Upon this point we are of opinion that for this injury the owners of the land, by whose direction the conduit was constructed, are alone liable. There was evidence that the defendants commenced the work of building the conduit in September, 1890, and completed it the following November. The jury might have so found. This action was commenced in May, 1891. The trial judge in substance ruled that the defendants were liable for the injury caused by the draining of the pond up to the commencement of the action, on the theory that as the defendants constructed the conduit, and made the trench into which the water of the pond found its way by underground percolation, they were liable, and that it was immaterial whether the injury was suffered during the time they were engaged in performing the contract or after its completion. The rule upon which the case was submitted to the jury would render the defendants liable for recurring damages for all time, or until the cause of the damage was removed, or the city shall condemn the water rights of the plaintiff. We think such a principle has no foundation in the law. The construction of the conduit was, in itself, a perfectly lawful act. It became actionable as to the plaintiff for reasons which lay outside of the realm of observation, and from causes which the defendants had no reason to anticipate. The conditions happened to be such that the conduit did operate to drain the water of the plaintiff's pond, a mile away. It would be an unreasonable rule which should subject a person doing an act on another's premises, under his authority, lawful in itself, to damages to the proprietor of adjacent lands, for consequential injuries, remotely resulting from the act, not naturally to be anticipated and flowing from occult causes which, to put it in the strongest way, could only be conjectured by men of science or disclosed by actual experiment. When the owner of land, in such case, ascertains that injury is being done, he may be bound to act. In the case of nuisance

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it is said, that "a party who has erected the nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land. But it is only where he continues to derive a benefit from the nuisance as by devising the premises or receiving rent" (BRONSON, J., in *Mayor, etc.*, v. *Cunliff*, 2 N. Y. 174), or where he has conveyed with covenants for the continuance of the nuisance. (*Waggoner v. Jermaine*, 3 Den. 306.) The plaintiff's remedy is, we think, exclusively against the city as the owner of the lands on which the conduit was laid, and the real author of the wrong for the consequential damages from the draining of the pond. The rule which would make the contractors liable would subject innocent parties, who cannot control and have no power to interfere with the conduit, to liability for acts such as the owners of property may lawfully direct and which involved injury to another, only because it turned out that the water of the pond communicated by hidden ways through the strata of the earth with the trench constructed by the defendants.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed. _____

In the Matter of the Application of HENRY BRADLEY,
Respondent, to Compel the Delivery of Books, etc., by
WILLIAM H. SULLIVAN, Appellant.

In proceedings under the Revised Statutes (1 R. S. 125, § 51) to compel an officer whose term has expired to deliver to his successor the books, papers, etc., appertaining to the office, all that the petitioner is required to establish is his election, and that he has duly qualified.

Questions as to the validity of the election may not be determined in such a proceeding.

Under the provisions of the statute in relation to town officers (§ 51, chap. 569, Laws of 1890) requiring every person elected to such an office, "before he enters on the duties of his office," and within ten days after notice of his election, to take the prescribed oath of office, and to file the same within eight days thereafter, where the oath is taken and filed by one elected as supervisor, this is an acceptance of the office, and his predecessor thereupon ceases to hold it, and has no further standing as

a member of the town board. It is for the other members of the board to pass upon the undertaking of the new member, furnished in compliance with the statutory provision (§ 60) which makes its approval a condition precedent to his right to receive the town moneys, books, etc.

Where, therefore, in such proceeding it appeared that the applicant had received his certificate of election to the office of supervisor, had filed the oath of office and that his bond had been approved by the town board, and it was objected that illegal ballots had been counted for the applicant, and he had not been elected by a majority of the legal ballots, also that his predecessor had not been notified and was not present at the meeting of the town board when the applicant's undertaking had been approved, *held*, that the objections were untenable, and that the application was properly granted.

(Argued March 6, 1894; decided March 13, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 8, 1892, which affirmed an order made at Special Term.

This was an application under the statute (1 R. S. 125, § 51) by Henry Bradley, who had received a certificate of his election to the office of supervisor of the town of Minerva, Essex county, and had filed his undertaking, which had been approved by the town board, to compel William H. Sullivan, his predecessor in that office, to deliver over the moneys, books, papers etc. belonging to such office. Sullivan objected that Bradley was not elected by the greatest number of legal ballots and had not duly qualified. His objection to the election was based on allegations charging the ballots cast thereat to have been marked in various ways and his objection to the qualification was that he was not present at, nor had notice of, the meeting of the town board at which Bradley's official undertaking was approved. The court, at Special Term, ordered Sullivan to make delivery as demanded and the order was affirmed at the General Term. An appeal was then taken by Sullivan to this court.

Robert Dornburgh for appellant. The proceeding cannot be maintained where there is a dispute as to the title, and the title of the applicant must be clear and free from doubt to

enable him to maintain it at any time. The title to an office cannot be tried in this proceeding, and where it is questioned, the statute does not afford the remedy which there is by quo warranto. The aim of the revisers was to give a statutory remedy only when the case was clear that there was a willful or obstinate refusal to deliver. (*Gilroy v. Smith*, 23 N. Y. S. R. 5, 15; *Bridgman v. Hall*, 16 Abb. [N. C.] 272; *People v. Stevens*, 5 Hill, 631.) Sullivan was not notified of the meeting of any of the members of the town board, did not meet with them, and took no part in the approval. He did not sign the approval and had no connection with it. No regular meeting is provided for by law; therefore, the action of the other members was without authority and invalid, for at least all should have been notified and a majority be present. (*Downing v. Ruger*, 21 Wend. 172; *Town of Westchester v. Davis*, 7 Hun, 647.) The applicant's claim that the question of the title to the office has been finally adjudicated is untenable. (*People ex rel. v. Shaw*, 133 N. Y. 493.)

John Foley for respondent. Bradley qualified as supervisor in all respects as required by law. (*Foot v. Stiles*, 57 N. Y. 399; *People ex rel. v. Crissey*, 91 id. 616, 635; *Cronin v. Stoddard*, 97 id. 371; Laws of 1890, chap. 569, § 60; Laws of 1866, chap. 78.) It was the duty of the justice to examine the title of the parties respectively so far only as to enable him to act. (*People v. Allen*, 42 Barb. 203; *Connor v. Devlin*, 24 id. 587; *People ex rel. v. Barrett*, 29 N. Y. S. R. 159.)

GRAY, J. With respect to the objections raised by Sullivan to the legality of the petitioner's election to office, it suffices to say that it appeared, upon the proofs, that he received a majority of the votes cast at the election in question and had received a certificate of his election from the board of canvassers. That was not only a sufficient showing; but more than was necessary to be shown, provided he had officially qualified

as required by law, to warrant the order in question. In *People ex rel. Bradley et al. v. Shaw* (133 N. Y. 493) we had occasion to review objections made to the counting of the ballots cast at the election now questioned, upon the ground that they were marked, and we held that it was the duty of the inspectors to have counted the ballots in declaring the result of the election and we sustained an order directing a peremptory writ of mandamus to issue, commanding the board of canvassers to re-assemble and to declare the result of the town meeting and to issue a certificate of election to the candidates having the greatest number of ballots cast for them. It appears that the writ was obeyed and, thus, petitioner received his certificate. This is not a proceeding to try the petitioner's title to the office. It is simply a summary proceeding authorized by the statute (1 R. S. 124, § 50); by which he seeks to obtain the town moneys and the books and papers accompanying the office, and all the petitioner was required to establish was the fact of his election, as evidenced by the proper certificate, and that he had duly qualified. The incumbent of the office, whose term had expired, cannot go into questions underlying the petitioner's election and which he may allege as invalidating it. For such purpose, the proceeding must be direct. The objection that the petitioner has not qualified is untenable. It is conceded that he had taken and filed his oath of office; but his predecessor in office claims, under his construction of the statutes, that it was necessary that the undertaking of the supervisor elect should be approved at a meeting of the town board at which he was present, or of which he had notice. He argues that he remained a member of the board until the undertaking of his successor was approved. We cannot so read the provisions of chapter 569, Laws of 1890. By section 51, every person elected to a town office, within ten days after notification of his election, is required to take his oath "before he enters on the duties of his office" and the filing of it, within eight days, the statute provides, "shall be deemed an acceptance of the office;" and an omission to take and file

such oath, within the time required by law, it is further provided, "shall be deemed a refusal to serve and the office may be filled as in case of vacancy." By section 60 every supervisor "shall, within thirty days after entering upon his office," deliver his undertaking to the town clerk, which shall be presented to the town board for approval, and until approved none of the moneys, books etc. of the town shall be delivered over to the supervisor elect. It is very clear that the law contemplates two steps by the candidate elected to office. The first to be taken is the filing of his oath of office. When that has been done, the office is deemed to have been accepted and that is equivalent to saying that the officer elect has entered upon its duties. It is after so entering upon his office, and within a specified time thereafter, that he is required to execute and submit his undertaking. That he is regarded as in office, when he has filed his oath, is perfectly clear from the provision that neglect to file the oath within the prescribed time causes a vacancy. When he has evidenced in the required manner his acceptance of the office to which elected, his predecessor is out and has no further standing as a member of the town board. It is for the other members to pass upon the undertaking of the new member, as a condition precedent to his right to take over the town moneys, books etc. into his custody.

The order should be affirmed, with costs.

All concur.

Order affirmed.

In the Matter of the Application of the SOUTHERN BOULEVARD
RAILROAD COMPANY to Acquire the Right to Construct a
Railroad, etc.

Where in proceedings under the General Railroad Act (Chap. 140, Laws of 1850, as amended) to condemn lands for railroad purposes, an award of commissioners is reversed and a new appraisal directed, and upon a second hearing a new award is made, the second report "is final and conclusive on all the parties interested (§ 18 of said act, as amended by chap. 198, Laws of 1876), and no appeal lies to this court from an order of General Term affirming an order of Special Term confirming the second report.

(Argued February 27, 1894; decided March 20, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 18, 1892, which affirmed an order of Special Term directing the Southern Boulevard Railroad Company to pay the trustees of the estate of Paul Spofford, deceased, an award for property condemned.

The facts, so far as material, are stated in the opinion.

George Hoadly for appellant. The order is appealable, and the constitutionality of the act of 1887 is reviewable by this court. (Code Civ. Pro. §§ 1324, 1337; *In re P. P. & C. I. R. R. Co.*, 85 N. Y. 496; *In re N. Y., L. E. & W. R. R. Co.*, 98 id. 447; *In re N. Y. & H. R. R. Co.*, 93 id. 121.) The failure of the courts below and of the commissioners of appraisal to recognize the act of 1887 as constitutional was fundamental error. (*Craig v. R., etc., R. R. Co.*, 39 N. Y. 404; *Louisiana v. Mayor, etc.*, 109 U. S. 285; *Chase v. Curtis*, 11 id. 452; Sedgwick on Stat. Const. [2d ed.] 594; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Fletcher v. Peck*, 6 Cranch, 87; *F. Bank v. Hale*, 59 N. Y. 53, 59; *Voorhees v. U. S. Bank*, 10 Pet. 449, 471; *Freeland v. Williams*, 131 U. S. 405; *People v. French*, 10 Abb. [N. C.]

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419.) The contract which the General Term evolved from the act of 1867 is one which the legislature had no power to make. (*In re T. F. S. R. R. Co.*, 102 N. Y. 346; *Lewis on Em. Domain*, § 473; *Kohl v. U. S.*, 91 U. S. 367; *People v. Kerr*, 27 N. Y. 211.) If it be held that the provisions of the statute of 1867 are, in any sense, a contract which the legislature had power to make, the contract is a limited and conditional one, dependent upon a contingency which has never arisen, and which, by reason of the amendment to the Constitution in 1875, can never arise. (*Tucker v. Ferguson*, 32 Wall. 527.) The order and the award sought thereby to be enforced, are absolutely void to the extent of six-sevenths of their amounts. (*In re Amsterdam*, 96 N. Y. 351; *In re N. Y. & H. R. R. Co. v. Kip*, 46 id. 546; *Strong v. City of Brooklyn*, 68 id. 1; *Embury v. Connor*, 3 id. 511.) The improper rejection of evidence at the hearing vitiates the award and orders appealed from. (*Sommer v. M. E. R. Co.*, 129 N. Y. 576; *Odell v. N. Y. E. R. Co.*, 130 id. 690; *In re Mayor, etc., of N. Y.*, 99 id. 569; *In re N. Y., W. S. & B. R. R. Co.*, 37 Hun, 317.)

William Pierrepont Williams for respondent. This appeal does not lie. (Laws of 1884, chap. 252; Laws of 1876, chap. 198; *N. Y. C. R. R. Co. v. Marvin*, 11 N. Y. 276; *People v. Betts*, 55 id. 600; *D. & H. C. Co.*, 67 id. 209; *In re N. Y. & H. R. R. Co.*, 98 id. 19; *In re S. B. R. R. Co.*, 128 id. 93.) When the condemnation under the act of 1867 had been effected, the provision for a special measure of compensation (upon a future condemnation by a railway company) became a contract between the state and the parties whose land was made servient to the highway. (*Vandermulen v. Vandermulen*, 108 N. Y. 201; *Lahr v. M. E. R. Co.*, 104 id. 289.) The amendment to chapter 290 of the Laws of 1867 was unconstitutional and a nullity so far as it purported to change the measure of compensation established by that act. (Const. U. S. art. 1, § 10; Laws of 1887, chap. 723; *Stephens v. Marshall*, 3 Chand. 229; *In re Canal Street*, 12

N. Y. 412; *In re Broadway*, 49 id. 154.) It is claimed that the easement taken affected only so much of the property as would support a double track. But by the petition and order the appellant acquired the right to use *any part* of the boulevard for that purpose, and to shift its track at will. Thus, no part of the property was free from the easement or (assuming that the highway was non-existent) would have been useful or marketable. The real estate expert and the commissioners, therefore, properly considered that the whole beneficial interest in the property was taken away. (*In re Amsterdam*, 96 N. Y. 351; *In re P. P. & C. I. R. R. Co.*, 13 Hun, 345; *Henderson v. N. Y. C. & H. R. R. R. Co.*, 78 N. Y. 423; *Newman v. M. E. R. R. Co.*, 118 id. 618; *Somers v. M. E. R. R. Co.*, 129 id. 576; *Page v. C. R. R. Co.*, 70 Ill. 324.)

BARTLETT, J. This appeal is taken by the Southern Boulevard Railroad Company from an order of the general term of the first department affirming an order directing payment to the trustees of the estate of Paul Spofford, deceased, of the sum of \$5,999.94, the difference between a first award of six cents and a second award of six thousand dollars under the General Railroad Law of 1850, providing for the acquisition of real estate by railways and the mode of fixing compensation for the same.

The Southern Boulevard Railroad Company began proceedings in January, 1890, under the General Railroad Law of 1850, to condemn the interest of certain property owners in land occupied by the Southern Boulevard in the twenty-third ward of the city of New York, in so far as the same were necessary for the purposes of said railroad. Commissioners were appointed, who, after hearing testimony, assessed the damages to be paid by the company to the property owners under chapter 723, laws of 1887, as amending laws of 1867, chapter 290, at a nominal sum of six cents. This award was reversed by the general term on the ground that the legislature had no power to repeal a part of chapter 290 of the laws

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of 1867 by enacting chapter 723 of the laws of 1887 which sought to confine the property owners to nominal rather than substantial damages. (58 Hun, 497.) From this order of reversal an appeal was taken to this court, which was dismissed on the ground it was not a final order. (128 N. Y. 93.) The matter then came on before the commissioners for a second hearing, which resulted in an award of six thousand dollars. An order was thereafter made at special term adjusting the difference between the two awards and directing the payment thereof. That order was affirmed at general term, and from it this appeal is taken.

The respondents make the preliminary objection that this appeal will not lie, for the reason that the appellant company is proceeding under the General Railroad Law of 1850 and its amendments, but that this proceeding having been instituted prior to May 1st, 1890, the rights of the parties must be sought in the act last mentioned, and, unaffected by the legislation of 1890, which did not take effect until the first day of May that year. (Code, § 3384.) The preliminary objection thus made is based on section 18 of chapter 140 of the laws of 1850, as amended by laws of 1876, chapter 198, wherein it deals with the matter of a second report or award made by the commissioners. It provides as follows, viz.: "On the hearing of such appeal" (that is, the appeal from the first report) "the court may direct a new appraisal, before the same or new commissioners, in its discretion; the second report shall be final and conclusive on all the parties interested." The respondents contend that said provision is fatal to this appeal. The appellant, replying to this contention, insists that as to the amount of the appraisal the second report is final and conclusive, but that it is at liberty to show that the property the commissioners valued is not that for which it was bound to pay.

The appellant also insists it is at liberty on this appeal to examine into the constitutionality of said act of 1887; the power of the legislature to contract with property owners under the said act of 1867; the fact whether the award has

evidence to support it, and whether or not material evidence was rejected by the commissioners at the hearing. We are of opinion that the question raised by this preliminary objection is not an open one in this court, and that the appeal herein must be dismissed.

In the *Matter of Prospect Park and Coney Island Railroad Co.* (85 N. Y. 489) this provision of the General Railroad Act of 1850 was construed. The petitioning company sought to acquire title to land in Gravesend avenue, Long Island. An appraisal was had which resulted in a report that was confirmed at special term and reversed by the general term. A second hearing was held before the commissioners and another report was made that was confirmed by both the special and general terms and an appeal was taken to this court. Judge EARL says: "Commissioners of appraisal were appointed, and after hearing the parties they made their report, awarding to the owners each one dollar as compensation for the land taken. That report was confirmed at special term; but upon appeal to the general term of the Supreme Court, the order of confirmation was reversed, and the report was set aside and new commissioners were appointed, who were ordered to make a new appraisal * * * on the ground that they had awarded but nominal damages, when the land owners appeared from the case as then presented to be entitled to more substantial damages. A hearing was had before the new commissioners, and they made their report which again awarded to the land owners nominal damages, one dollar each for the land taken." The court, after setting forth the appeal to the special and general terms and to this court, proceeds with the consideration of the case as follows (p. 496): "This was a second report, and the amount awarded to each land owner was the same as by the first report. The order of confirmation by the special term was, therefore, entirely useless and harmless, and nugatory as well; and so the order of the general term affirming that of the special term, so far as I can perceive, served no purpose and decided nothing. The appeal to the

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general term brought there no question to review. The report of the commissioners, as to the amount of damages, was of itself final and conclusive. If the land owners, in such a case, claim that there was any irregularity, fraud or mistake in the proceedings of the commissioners, or back of such proceedings, their remedy is by motion to set the award and proceedings aside, and not by appeal from the award, or the order confirming the same; and, from orders made upon such motions, appeal may be had, even to this court, if they involved substantial rights, and do not rest in discretion."

In the *Matter of the Petition of the New York and Harlem Railroad Company* (98 N. Y. 12) this same question was referred to by Judge EARL. After holding that an order of the general term reversing an order which confirmed an award in a first proceeding and directed a new appraisal, was not reviewable here for the reason it was not a final order in a special proceeding, Judge EARL says: "It is nevertheless not a final order, and if the result should be that the company will not be able to bring to this court for review the question of law upon which it appears, from the opinion of the general term, the new appraisal was ordered, it will be the fault of the law and not of this court. If, however, upon the new appraisal, the commissioners should proceed upon a fundamentally erroneous view of the law, and thus do either party injustice, the ingenuity of counsel may possibly discover some mode of correcting the error, and, if necessary, for procuring a review of the question in this court. (*In re P. P. & C. I. R. R. Co.*, 85 N. Y. 489, 496.)" (See generally on this subject *N. Y. C. R. R. Co. v. Marvin*, 11 N. Y. 276; *People ex rel. v. Betts*, 55 id. 600; *In Matter of D. & H. C. Co.*, 69 id. 209; *In Matter of Metropolitan El. Ry. Co.*, 128 id. 600.) *In Matter of N. Y., L. & W. Ry. Co.* (1 Silvernail, 91), Judge RAPALLO, writing as late as 1886, says, in deciding a point not involved in case at bar: "Aside from other answers to this argument of the respondent, a sufficient one is that although, under the statute, the petitioners could not by appeal obtain a review, on the merits, of a second award, yet it would be

within the power of a court of equity to set aside any excessive award obtained by fraud or the misconduct of the commissioners, or for any cause which would justify setting aside an award of arbitrators; and in a proceeding like this the same relief could be obtained on motion." We, therefore, hold that no appeal lies from the order of the general term, affirming the order of the special term, directing the payment of the difference between the first and second awards.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

DANIEL C. HEWITT, Appellant, v. MOSES NEWBURGER,
Respondent.

While to constitute a crime it is not necessary in all cases that the person charged should know that the statute prohibits the act, where a particular intent is an ingredient, the mere doing of the prohibited act does not constitute the crime unless accompanied with the unlawful intent.

While the provision of the Penal Code defining the offense of intrusion on lands (§ 467) does not in terms make the intent a material element to constitute the offense, an unlawful and criminal intent must be alleged and proved.

When certain facts are to be proved to a court having only a special and limited jurisdiction as a basis of its action a total defect of evidence as to any essential fact renders its action void.

Plaintiff was arrested by virtue of a warrant issued by the recorder of the city of Amsterdam, upon information sworn to by defendant, based upon the provision of the Code of Criminal Procedure (§ 84) authorizing an information to be laid before a magistrate that a person has threatened to commit a crime against "the person or property of another." The information charged that plaintiff threatened to commit the crime of injuring property of a corporation named (Penal Code, §§ 639, 654), in that he threatened to tear down a wall then being erected thereon, and there was just reason to fear that he would tear down and demolish it. The warrant recited the facts substantially as stated in the information; neither alleged any unlawful or criminal intent. In an action for false imprisonment it appeared that defendant asked that the warrant be issued; he received and delivered it to the chief of police with a request that it be served "right away." After the arrest plaintiff was taken to the recorder's office, and thereafter, on motion of his counsel, the

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proceeding was dismissed. *Held*, that the recorder acquired no jurisdiction, and so the warrant and all proceedings under it were absolutely void; and that defendant was liable.

Hewitt v. Newburger (66 Hun, 230), reversed.

(Argued March 6, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward P. White for appellant. The process was without authority of law. The information did not allege any fact tending to prove a crime or a threat to commit a crime. (*Loomis v. Render*, 41 Hun, 268; Code Crim. Pro. §§ 84, 86, 99; Penal Code, §§ 639, 653, 654; *People v. Hart*, 24 How. Pr. 289; *People v. Stephens*, 109 N. Y. 159; *Austin v. Vrooman*, 128 id. 229; *Cagwin v. Town of Hancock*, 84 id. 541; *Warner v. Perry*, 14 Hun, 337; *Comfort v. Fulton*, 39 Barb. 56; *Blodgett v. Rice*, 18 Hun, 132; *Staples v. Fairchild*, 3 N. Y. 41; *Potter v. Ogden*, 136 id. 396; *Lewis v. Rose*, 6 Lans. 206; *Gardner v. Bain*, 5 id. 256; *Pratt v. Bogardus*, 49 Barb. 89.) The defendant made himself liable for the arrest. (137 N. Y. 394; *Miller v. Adams*, 52 id. 409; *Curry v. Pringle*, 11 Johns. 444; *Bigelow v. Stearns*, 19 id. 39; *Adkins v. Bremer*, 3 Cow. 206; *Murphy v. Kron*, 20 Abb. [N. C.] 259; *Von Latham v. Libby*, 38 Barb. 345; *Carl v. Ayers*, 52 N. Y. 17; *Palmer v. Foley*, 71 id. 109; *Marks v. Townsend*, 96 id. 599; *Fischer v. Langbein*, 103 id. 93; *Voltz v. Blackmar*, 64 id. 440.)

Z. S. Westbrook for respondent. The recorder had jurisdiction of the alleged offense of the plaintiff, and authority to take the complaint and issue the warrant for his arrest. (Laws of 1885, chap. 131, §§ 46-49.) The complaint for the

warrant on which plaintiff was arrested was lawfully sufficient to charge a threatened criminal offense. (Code Crim. Pro. §§ 84, 85, 87, 88, 89, 145, 148, 149, 150; Penal Code, §§ 639, 654; *Blodgett v. Race*, 18 Hun, 132; *Pratt v. Bogardus*, 49 Barb. 89.) The recorder having jurisdiction of the alleged offense he acted judicially, and no action for false imprisonment will lie for his acts, though he may have erred. (*Marks v. Townsend*, 97 N. Y. 590; *Fischer v. Langbien*, 103 id. 84; *Lange v. Benedict*, 73 id. 35; *Sleight v. Ogle*, 4 E. D. Smith, 445; *Bocock v. Cochran*, 32 Hun, 523; *Nowalk v. Waller*, 31 N. Y. S. R. 458; *Gardner v. Bain*, 5 Lans. 256; *Von Latham v. Libby*, 38 Barb. 339; *Lewis v. Rose*, 6 Lans. 209; *Landt v. Burton*, 19 Barb. 283, 289; *Pratt v. Bogardus*, 49 id. 89; *Beaty v. Perkins*, 6 Wend. 382; Penal Code, § 654; *Miller v. Adams*, 7 Lans. 131; 52 N. Y. 409; *Rodergas v. E. R. S. Bank*, 63 id. 464.) This action is strictly for false imprisonment. (*Brown v. Chadsey*, 39 Barb. 261, 263; *Burns v. Erben*, 40 N. Y. 466.)

BARTLETT, J. This is an appeal from a judgment of the general term of the Supreme Court, third department, affirming a judgment rendered at the Montgomery County Circuit dismissing the complaint. This action is to recover damages for an alleged false imprisonment. The plaintiff was arrested in the city of Amsterdam by virtue of a warrant issued upon an information sworn to by the defendant. The information alleged that "one Daniel Hewitt did threaten to commit the crime of injuring property belonging to the City Mills, a corporation in said city of Amsterdam, in that he threatened to tear down a wall now being erected by said corporation, and being the property thereof, and the same is being built for the purposes of a dam, and there is just reason to fear that the said Daniel C. Hewitt will tear down and demolish said wall, as he, the said Daniel C. Hewitt, hath, as above, threatened to do."

The warrant issued thereon by the recorder of the city of Amsterdam reads as follows, in its material part: "Information upon oath having this day been laid before me that the

crime of threatening to injure and destroy property in the city of Amsterdam, * * * in that Daniel C. Hewitt did on the 27th day of June, 1891, threaten to tear down and destroy a wall now being built in the said city by the City Mills, a corporation in the said city, and said wall being owned by said City Mills, and is being built for the purpose of a dam, and accusing the said Daniel C. Hewitt thereof. You are, therefore, commanded, etc." The plaintiff was arrested by virtue of this warrant on Saturday evening, detained in the recorder's office about two hours, was heard through counsel, who moved to dismiss the proceeding, the motion being granted the next Monday morning, the plaintiff having been allowed to go home in the meantime. This action is sought to be maintained on the ground that the process was without authority of law for the reason that neither the information nor the warrant charged the plaintiff with the commission of any crime, or with threatening to commit any crime, known to the law, and, consequently, the recorder acquired no jurisdiction in the alleged proceeding, and the defendant is liable in damages for the illegal arrest. The defendant's counsel seeks to meet this attack on the information and warrant by citing the sections of the Code of Criminal Procedure and Penal Code upon which the proceeding before the recorder was based. The information was sworn out under Code of Criminal Procedure, part II, title II, chapter II, entitled "Security to keep the Peace." Section 84 reads: "An information may be laid before any magistrate that a person has threatened to commit a crime against the person or property of another." The crime alleged to have been threatened is to be found in sections 639 and 654 of the Penal Code. Section 639 reads: "A person who willfully *or* maliciously displaces, removes, injures or destroys * * *. 2. A pier, boom or dam, lawfully erected or maintained upon any water within the state, or hoists any gate in or about said dam; * * * is punishable by imprisonment for not more than two years." Section 654 provides that a person who unlawfully *and* willfully destroys or injures any real or personal property of another shall be punished by

fine and imprisonment as specified. It is not possible to hold under the most liberal rule of construction that the information in the case at bar contains allegations proper and sufficient to charge the plaintiff with having threatened to commit the crime set forth in either of the sections quoted. If it was the intention to have charged the plaintiff under said section 639 it should have been alleged that he willfully or maliciously threatened to do the act set forth; or if the charge was under said section 654 it should have been averred that he unlawfully and willfully threatened to do the act specified. If plaintiff was proceeding under a claim of title and insisting that the wall of the City Mills was being erected on his own land, he committed no crime in threatening to remove it; there is nothing in the record to show whether he was acting lawfully or unlawfully. The fatal vice of the information and warrant is that they utterly fail to aver the unlawful and criminal intent which constitutes crime. In *People v. Stevens* (109 N. Y. 159, 163), Judge ANDREWS says:

“To constitute a trespass on land an indictable offense, the distinguishing feature is an unlawful and criminal intent. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury. (1 Hale’s P. C. 509.) It is not necessary in all cases to constitute a crime that a defendant should know that the statute prohibits his act. It is sufficient if he does the act prohibited when the statute makes the mere act itself unlawful. But where a particular intent is an ingredient of the crime, the mere doing of the prohibited act does not constitute the crime unless accompanied with unlawful intent. The cases of larceny, receiving stolen goods, or passing counterfeit money are illustrations. The same act may in one case be larceny, or forgery, or a guilty reception of stolen property, and in another wholly innocent, depending on the intent. Section 467 of the Penal Code, defining the offense of intrusion on lands, does not, it is true, in terms make the intent a material element of the offense. But it cannot be supposed that the legislature intended to subject a person to criminal punish-

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ment, as when, for example, there being a dispute between neighbors as to the line between them, one moves his fence on his neighbor's land under a *bona fide* though mistaken belief that he was placing it on the true line, or where a lot owner in a city or village, in erecting a building, encroaches innocently, although without authority, upon the street. Yet both of these cases are within the letter of the statute, but manifestly they are not within the statute, because, looking at the reason of the thing, the ineffaceable distinction between innocence and crime, and the antecedent law, the existence of a criminal intent, as a necessary constituent of the offense, must be implied."

In the case of *Wass v. Stephens* (128 N. Y. at page 128) Judge ANDREWS thus defines the word "willfully." "But the word 'willfully' in the statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness." The wrongful purpose, the design to injure, the motive of lawlessness or wantonness are all lacking in the information against plaintiff which was laid before the recorder and upon which the warrant issued. This being so, the act of the recorder was wholly without jurisdiction and the warrant and all proceedings under it were absolutely void. This principle is recognized in *Potter v. Ogden* (136 N. Y. at page 396). Judge FINCH says: "It is well settled that, when certain facts are to be proved to a court having only a special and limited jurisdiction as a basis for its action, a total defect of evidence as to any essential fact will make its action void, while some proof of every such fact may enable it to proceed." In the case at bar there was no proof of the essential facts. (*Curry v. Pringle*, 11 Johns. 444; *Bigelow v. Stearns*, 19 id. 39; *Murphy v. Kron*, 20 Abb. [N. C.] 259.) This process being void the defendant is liable; the evidence shows him to have been active and officious in procuring this arrest; he went to the office of the recorder and said he wanted a

warrant for the arrest of plaintiff; he stated the facts, swore to this information, procured the warrant, handed it to the chief of police, said he wanted it served "right away," offered to provide "a rig" to go to plaintiff's house, and sent his son later to inform the officer where he could and did find plaintiff in a certain store at Amsterdam. All these circumstances establish defendant's liability, and it was for the jury to determine what damages, if any, the plaintiff had suffered in the premises.

The judgment should be reversed, new trial ordered, with costs to abide the event.

All concur.

Judgment reversed. _____

In the Matter of the Accounting of ANNA PARKER PRUYN,
as Executrix, etc.

Where an executor and executrix who were legatees under the will executed an instrument stating that their accounts were settled "as between themselves, and as between themselves and said estate," and mutually releasing each other from every liability "by reason of anything relating to the estate or the doings or proceedings of either of them as executrix or executor of said will," *held*, that the release was a bar to proceedings instituted by the executor before the surrogate to compel the executrix to account. Also, that the effect of the instrument as a bar was not affected by the fact that there was an infant interested in the estate; that the release, while it stands, was effectual as a bar under all circumstances as between the executor and executrix.

(Argued March 12, 1894; decided March 20, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 6, 1893, which reversed an order of the Surrogate's Court of the county of Albany directing an accounting.

The petitioner, John V. L. Pruyn, was an executor and a legatee under the last will of his father, John V. L. Pruyn, deceased, and by this petition he has sought to compel Mrs. Anna P. Pruyn, the widow and an executrix under the will, to render an account of her proceedings as such executrix

since January, 1878; at which time letters testamentary were granted to her. Upon the return day of the citation to her, Mrs. Pruyn filed an answer; setting forth the execution by the petitioner, Pruyn, of a release of all claims and demands etc. and a motion was thereupon made on her behalf to dismiss the petitioner's proceedings. The release referred to was in an agreement executed between Mrs. Pruyn, as widow and executrix of the testator; the petitioner Pruyn, as the son and executor of the testator, and Harriet, a daughter of the testator, and was dated June 15th, 1889. The instrument mentioned divisions of the property as having been made in the years 1880 and 1887, by agreement between Mrs. Pruyn and Mr. Pruyn, in accordance with the will; Mrs. Pruyn acting at the time therein as guardian of her two daughters Harriet and Huybertie. It proceeded to ratify and confirm those divisions and the statement of the accounts relating to the estate; and set forth that "said accounts are settled as between themselves and as between themselves and said estate." Then followed mutual releases; by which Mrs. Pruyn and Mr. Pruyn released each other from every liability "by reason of anything relating to the estate, or the doings or proceedings of either of them, as executrix or executor of said will."

The surrogate of the county of Albany denied the motion to dismiss the proceeding, and ordered Mrs. Pruyn to render a full and complete account of all her proceedings as executrix etc. Upon appeal, the General Term reversed the surrogate's order and the petitioner has appealed to this court.

Barnwell Rhett Heyward and *Edwin Countryman* for appellant. The order is appealable. (*In re Gilbert*, 104 N. Y. 205; *Fiester v. Shepherd*, 92 id. 251; *In re Hulsey*, 93 id. 48; *In re Soule*, 46 Hun, 661.) The petitioner is entitled to an accounting as a matter of right. (Code Civ. Pro. §§ 2514, 2724, 2726, 2727; *In re Wagner*, 119 N. Y. 33; Redf. Surr. Pr. 98; *Wood v. Brown*, 34 N. Y. 337; *Burt v. Burt*, 41 id. 46; *Buchan v. Rintoul*, 70 id. 1.) The agreement does not relieve the executrix from accounting.

(Code Civ. Pro. §§ 2587, 2727.) The release does not discharge the petitioner. (Perry on Trusts, §§ 94, 274, 283, 401, 920, 921; *Craig v. Craig*, 3 Barb. Ch. 76, 100; *Thacher v. Cander*, 3 Keyes, 157; *Shepherd v. McIver*, 4 Johns. Ch. 136; *Ridgely v. Johnson*, 11 Barb. 527; *Pearce v. Pearce*, 22 Beav. 248; *Cruger v. Halliday*, 11 Paige, 314.)

J. Newton Fiero for respondent. The petitioner is not entitled to the relief asked for and granted by the court below, because he is shown not to have any interest whatever in the estate, and this appears by his own solemn act acknowledging settlement and satisfaction in full of his claims against the estate and releasing the executrix therefrom. In the absence of any allegation of fraud or mistake, no court, whether at common law or in equity, would have any right whatever to set aside the release, or to entertain jurisdiction of the action for that purpose. (*In re Wagner*, 52 Hun, 23; 119 N. Y. 28.)

GRAY, J. It is difficult to perceive upon what principle the surrogate determined the liability of Mrs. Pruyne, the executrix, to render an account of her proceedings, upon this application. We are without any opinion by him and we can only suppose he must have regarded the matter much in the same light as does the petitioner; namely, that an accounting is so much a matter of strict right, as to override and render ineffectual this agreement of the parties. We had occasion, in the *Matter of Wagner's Estate* (119 N. Y. 28), to consider the question of the effect of a release, given by a person who was interested in an estate in course of administration, upon a subsequent application to compel an accounting by the executor. The case was a much stronger one than this; for there the petitioner was not the person who had executed the release, but it was his widow and administratrix, and she alleged fraud in its procurement. Here the agreement of release is not attacked upon any ground whatever; but the court is simply asked to disregard it as constituting any bar to the petitioner's right to maintain the proceeding. The principle of our decision in the *Wagner*

case (*supra*) applies fully here and what we said there we may repeat here; that it is the surrogate's "duty to deny the petition, if it should appear that the petitioner is not, on the face of the proceedings, entitled to the order and he should not permit the executor to be uselessly harassed." By the terms of the release in this case, nothing was left open to question as to the estate in course of administration. The settlement between the parties was of the most complete character and the agreement evidencing it, so long as it stands as their agreement, prevents either of them from setting in motion the machinery of the Surrogate's Court to compel a judicial accounting by the other. The right and interest of each in the estate have been extinguished; except as to any residuary interest of a vested or contingent nature; an exception provided for in the agreement and which affects possible future interests and not the past administration. The appellant, however, endeavors to sustain his proceeding in other ways. He says that an accounting should be had as to certain securities, which were set apart by agreement in 1887, "as a fund to yield an income" for the maintenance of the family residence; the use of which was devised to testator's widow. That agreement was between the same parties; it is not attacked upon any ground and it remains in full force. The petitioner's application was to compel the executrix to render a full account of all her proceedings as executrix and neither did, nor could, contemplate that she should account for the expenditure since 1889 of the income of the fund, so appropriated by their agreement to a specific purpose and which, so far as the record informs us, is held by them jointly. With respect to that they have no claim to call each other to any account in the Surrogate's Court; whatever may be rendered necessary upon the widow's death. The appellant argues that the fact of there being a minor child, who was not a party to the agreement of 1889, imposes upon him the discharge of the duty to compel an accounting by the executrix. It is sufficient to say, as to that suggestion, that the minor has not been brought into the proceeding and, if she had been, it would not have

Opinion of the Court, per GRAY, J.

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been of any avail to the petitioner in support of his demand upon Mrs. Prutyn for an account of her proceedings. The rights of the minor were not affected by anything that was done and she was not precluded from asserting her rights and from compelling an accounting as to her interests, if she so elected, upon coming of age. The bar to such a proceeding as this by the petitioner, which was interposed by the agreement of release in question, is, while it stands, effectual under all circumstances as between him and the executrix. The questions have been so fully discussed at the General Term, as to render it unnecessary for us to say more than we have.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

CHARLES M. HIBBARD, Respondent, *v.* THE COMMERCIAL
ALLIANCE LIFE INSURANCE COMPANY of New York,
Appellant.

(Submitted December 11, 1893; decided January 16, 1894.)

APPEAL from order of the General Term of the Superior
Court of the city of New York, made July 3, 1893, which
affirmed an order of Special Term granting a motion to refer
and appointing a referee.

Geo. Wilcox for appellant.

Lucius McAdam for respondent.

Agree to affirm ; no opinion.

All concur, except BARTLETT, J., not sitting.

Order affirmed.

THE WEST SIDE RAILROAD COMPANY of Elmira, New York,
Respondent, *v.* THE NEW YORK, LAKE ERIE AND WESTERN
RAILROAD COMPANY, Appellant.

(Argued December 11, 1893; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme
Court in the fourth judicial department, made September 12,
1893, which reversed an order of Special Term denying an
application by plaintiff to intersect the tracks of defendant.

D. C. Robinson for appellant.

Frederick Collin for respondent.

Agree to affirm ; no opinion.

All concur, except BARTLETT, J., not sitting.

Order affirmed.

In the Matter of the Application of THOMAS F. RYAN, as Receiver, etc.

In the Matter of the Claim of RAWITSER & BROTHER.

(Argued December 11, 1893; decided January 16, 1894.)

CROSS APPEALS from order of General Term of the Supreme Court in the first judicial department, made July 5, 1893, which modified, and affirmed as modified, an order of Special Term confirming the report of a referee.

L. Laflin Kellogg for receiver.

Otto Horwitz for Rawitser & Brother.

Agree to affirm on opinion below.*

All concur, except BARTLETT, J., not sitting.

Order affirmed.

GERARD WESSELS et al., Appellants, v. GUSTAVUS ADOLPHUS BOETTCHER, Defendant; GEORGE W. MCKENZIE, Respondent.

(Argued December 11, 1893; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday of October, 1893, which affirmed an order of Special Term granting leave to George W. McKenzie, attorney for defendant, to issue execution in his own name.

Joseph A. Shoudy for appellants.

Noah Cromwell Rogers for respondent.

Agree to dismiss appeal; no opinion.

All concur, except BARTLETT, J., not sitting.

Appeal dismissed.

JOHN S. KEYES et al., Individually and as Executors, etc.,
Appellants, *v.* **BARBARA ELLEN SOHN**, Impleaded, etc., et al.,
and **ANNA KRISTOF**, by Guardian ad litem, Respondents.

(Argued December 18, 1893; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 28, 1893, which affirmed an order of Special Term vacating a judgment as to the defendant Anna Kristof, an infant, and authorizing Samuel D. Sowards, her guardian *ad litem*, to appear and answer.

Edward C. Perkins for appellants.

Isaac N. Miller for respondents.

Agree to dismiss appeal; no opinion.

All concur, except **BARTLETT, J.**, not sitting.

Appeal dismissed.

M. FILLMORE BROWN, as Administrator, etc., Respondent, *v.*
THE BUFFALO CREEK RAILROAD COMPANY, Appellant.

(Argued December 12, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made July 14, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

George F. Brownell for appellant.

M. Fillmore Brown for respondent.

Agree to affirm; no opinion.

All concur, except **EARL** and **GRAY, JJ.**, dissenting, and **BARTLETT, J.**, not sitting.

Judgment affirmed.

**WILLIAM F. SMITH, Respondent, v. JOHN T. LANE et al., as
Executors, etc., Appellants.**

(Argued December 12, 1893 ; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 10, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Francis Lynde Stetson for appellants.

A. Britton Havens for respondent.

Agree to affirm on the two grounds first mentioned in opinion of BARRETT, J., below.*

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

**DANIEL HUNT, as Executor, etc., Appellant, v. ELLEN GLEASON
et al., Respondents.**

(Argued December 13, 1893 ; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made the second Monday of February, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and granted a new trial.

William Popham Platt for appellant.

John H. Clapp for respondents.

Agree to affirm, and for judgment absolute on stipulation, on opinion below.

All concur, except BARTLETT, J., not sitting.

Order affirmed.

**In the Matter of Proving the Alleged Will of JOSHUA
RAPLEE, Deceased.**

(Argued December 14, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which reversed a decree of the Surrogate's Court of Yates county revoking the probate of the will of Joshua Raplee, deceased, and confirming the probate of said will.

John Gillette for appellants.

William S. Briggs for respondents.

Agree to affirm on opinion below.*

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

NICHOLAS SAUERBORN, as Administrator, etc., Respondent, *v.*
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

(Argued December 14, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 9, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

S. W. Jackson for appellant.

Alonzo P. Strong for respondent.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

* 66 Hun, 558.

In the Matter of the Judicial Settlement of the Account of
HENRY B. BOLTON et al., as Executors, etc.

HENRY B. BOLTON et al., Respondents; SARAH L. MYERS et
al., Appellants.

The jurisdiction of this court on appeal from a judgment of General Term affirming a surrogate's decree on settlement of the accounts of executors is limited to questions of law presented by proper exceptions.

(Argued December 15, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 8, 1893, which affirmed a decree of the Surrogate's Court of Westchester county settling the accounts of Henry B. Bolton and Thomas Bolton, Jr., as executors of the will of Ann Bolton, deceased.

The following is the opinion in full:

"Upon the accounting of the executors of Ann Bolton, deceased, Mrs. Myers and Mrs. Littlewood, her daughters, appeared as contestants and filed objections to the accounts rendered. The decree of the surrogate was adverse to them as to various items, and we are now to determine whether any of their overruled objections were well taken.

"Our jurisdiction is more limited than that of the surrogate and of the Supreme Court, as we can consider only questions of law presented for our consideration by proper exceptions. While after careful examination we find no error of law in this record, we are not without some misgivings that injustice may have been done to the contestants in the settlement of the accounts, but we see no remedy for it here.

"Mrs. Bolton died in November, 1882, leaving two sons, the executors, two daughters and an adopted son, William H. Birchall. From a period anterior to 1880 down to the time of her death she owned certain real estate occupied by a manufacturing establishment upon which for many years the business of bleaching, dying and printing had been carried on. On the first day of March, 1880, she leased to her two sons and adopted son this real estate with all the machinery thereon for the term of ten years for an annual rental, and they carried

on the business there under the name of the Bronx Company. Shortly before the expiration of the lease the real estate was taken by the city of New York by condemnation proceedings for the Bronx park, and an award was made therefor to the owners thereof, which was paid and distributed. The lessees continued to occupy the real estate and the machinery until a short time before August 31st, 1891, when they were ordered by the city to surrender the possession of the real estate and remove the machinery. They then advertised, and on that day sold by auction the machinery belonging to the estate of the deceased for \$592.82. Most of the machinery was purchased by Mr. Birchall and thereafter taken to West Farms, a distance of two or three miles, and there put into other buildings and used in the same business by the Bronx Company. It was claimed before the surrogate, and is now claimed by the contestants, that the machinery at the time of the sale was worth over \$52,000; that the sale thereof was improvident; that the machinery was really purchased by the Bronx Company and for it by and through Birchall; that the Bronx Company had had the benefit of the purchase, and that, therefore, the executors, who were two of the three members of the Bronx Company, should be charged with the value thereof.

"We are inclined to think that as matter of justice the executors should be charged with a larger sum for the machinery than it brought at the auction sale. But there was really no reliable basis in the evidence before the surrogate for doing it. The sale is not attacked for fraud. It was extensively advertised in newspapers and by printed notices and catalogues. Notices of the sale were mailed to the contestants and their counsel, and there is no evidence that they did not receive them. There can be no doubt that the executors meant to give, and did in fact give ample notice of the sale. At the sale there were present from fifty to seventy-five persons, among them several dealers in second-hand machinery. The sale was fairly conducted by a competent and experienced auctioneer, and there is no charge that any artifice was used by any one to stifle competition among bidders, or that the machinery was not sold in parcels and in such manner as to bring the best price. There was competition among bidders,

there being more than one bid for each article sold. Mr. Birchall at the auction sale purchased most of the machinery, and some was bid off by others. Of the articles so bid off he subsequently purchased some at an advanced price, and some of it was retained by such bidders. While the evidence is not entirely clear upon the subject, it is quite convincing that Birchall paid for the machinery with the money of the Bronx Company, and that the machinery was removed to West Farms and most of it there placed in buildings at the expense of that company, and for its benefit, and that it has since been used by that company in its business. Now, what could the executors have done better? They, for their own protection, were bound to sell by auction, and they made the best sale they could. They were not requested to postpone the sale, and no protest was made against it. So far as appears they had no reason to suppose that the contestants objected to the sale at that time and in that way, or that better prices could be obtained by postponing the sale to some future time. As to the value of the machinery evidence was given that at the time the real estate was appraised in the condemnation proceedings, two witnesses were called by the executors as claimants there who testified that the machinery was worth about \$52,000, and one of the same witnesses was called by the contestants before the surrogate and testified that at that time the machinery was, in his opinion, worth that sum. But his estimate was that it was worth that sum in position in the buildings, and in use there in a large, established and prosperous business. But he did not estimate its value to be sold there and removed, and used or re-sold elsewhere. It is common experience that machinery sold in a mill, to be removed therefrom, will usually bring but a small sum, far less than its intrinsic value. That is so because generally it is difficult to find purchasers for such machinery, and hence the absence of real competition keeps down prices. The experienced auctioneer who made the sale testified that it was heavy machinery, that it was located at a place from which it was difficult of transportation; that he judged from the location of it and the character of a great deal of it, which was very old, that it brought about all it was worth; that

there was nothing sold on one bid ; that he saw a number of dealers in second-hand machinery there. There was the further difficulty in charging the executors with any particular value for this machinery, that it did not appear precisely what machinery was put to use in their manufacturing establishment at West Farms, nor what was the approximate value of that machinery at the time of the sale for removal from the place where it was. Taking all these facts, with the testimony of the auctioneer as to value, and the evidence of the value furnished by the sale made as it was, we cannot say that the surrogate erred as matter of law in refusing to charge the executors for the machinery a larger sum than they obtained therefor at the auction sale. We think it would be impossible now for any one to take all the evidence in this record and fix a value which ought to be paid upon the machinery taken and in use by the Bronx Company over and above that obtained therefor at the auction sale.

“ Thomas Bolton, senior, for the purpose of protecting his real estate against his creditors, executed a mortgage thereon without any consideration to Mr. Birchall, and he immediately assigned that mortgage without any consideration to Mrs. Bolton, the deceased. The mortgagor died in January, 1879, leaving a will by which he gave all his property to his wife, Ann Bolton, and he appointed his son Henry B. Bolton his executor. After his death Ann Bolton, for the purpose of cutting off the creditors of her husband, foreclosed that mortgage, and upon such foreclosure and the sale in pursuance thereof she obtained against Henry B. Bolton, as executor of his father, a deficiency judgment of upwards of \$29,000. Her executors made no attempt to collect that judgment, and, hence, the claim is made that they should be charged with the amount thereof. Assuming that the judgment was enforceable against the estate of the mortgagor, it is a sufficient answer to this claim that there was no proof that the judgment was collectible, or worth anything, inasmuch as the mortgagor died insolvent. There was, therefore, no basis for making any charge on account thereof against the executors.

“ The Bronx Company were the brokers and financial agents of Mrs. Bolton, and the executors claimed credit upon their

accounting for divers sums of money paid for her in her lifetime, and the contestants objected to the allowance of many of these items. The answer to these objections is that there was evidence quite satisfactory that all these payments were made at the request of Mrs. Bolton.

"What we have thus far said covers the principal points made by the appellants upon this appeal, and a careful examination of the whole case brings us to the conclusion that there were no legal errors committed by the surrogate to the prejudice of the appellants, and that the judgment must be affirmed, with costs."

James R. Marvin for appellants.

Alexander Thain for respondents.

EARL, J., reads for affirmance.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

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142 433

CHARLES E. STOKES, Appellant, *v.* HENRY WESTON et al.,
Impleaded, etc., Respondents.

(Argued December 15, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

John D. Teller for appellant.

Frank S. Coburn for respondents.

Agree to affirm on opinion of General Term.*

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

* 69 Hun, 608.

In the Matter of the Probate of the Last Will and Testament
of LORENZA M. SHELDON, Deceased.

SOLEMNUS D. SEAMANS, Appellant; TRUMAN H. DAY,
Respondent.

(Argued December 19, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the
Supreme Court in the fourth judicial department, entered
upon an order made September 13, 1892, which affirmed a
decree of the Surrogate's Court of Madison county admitting
to probate the will of Lorenza M. Sheldon, deceased.

H. J. Cookingham for appellant.

Joseph Mann and *Charles E. Smith* for respondent.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

JOHN L. GROSS, Respondent, v. WILLIAM L. MOORE, as
Administrator, etc., Appellant.

(Argued December 19, 1893; decided January 16, 1894.)

APPEAL from order of the General Term of the Supreme
Court in the first judicial department, made the first Monday
of May, 1893, which overruled defendant's exceptions, denied
a motion for a new trial and ordered judgment in favor of the
plaintiff upon decision of the court on trial at Special Term.

Herbert Kettell for appellant.

Cephas Brainerd, Jr., for respondent.

Agree to affirm on opinion of General Term.*

All concur, except BARTLETT, J., not sitting.

Order affirmed and judgment accordingly.

* 68 Hun, 412.

JOHN S. HULIN, Appellant, v. NORMAN B. SQUIRES et al., as
Executors, etc., et al., Respondents.

(Argued December 20, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made March 15, 1893, which reversed an interlocutory judgment in partition in favor of plaintiff entered upon an order of Special Term, and directed a judgment in favor of defendants, declaring the plaintiff and defendants, who are the heirs at law of Franklin W. Farnam, deceased, entitled to the real and personal property attempted to be disposed of under the fifth clause of his will.

E. Countryman for appellant.

R. A. Parmenter and *Edwin A. King* for respondents.

Agree to affirm on opinion of General Term.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

In the Matter of the Final Judicial Settlement of the Accounts
of DOUGLASS BOARDMAN, as Executor, etc.

(Argued December 21, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 13, 1892, which modified, and affirmed as modified, a decree of the Surrogate's Court of Tompkins county.

William N. Noble for appellants.

S. D. Halliday for respondents.

Agree to affirm; no opinion.

All concur, except EARL, J., not voting, and BARTLETT, J., not sitting.

Judgment affirmed. •

BRIDGET WARD, as Administratrix, etc., Appellant, v. THE
ROCHESTER ELECTRIC RAILWAY COMPANY, Respondent.

(Argued December 21, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which denied a motion for a new trial and ordered judgment for defendant upon a decision of the court nonsuiting plaintiffs on trial at Circuit.

Quincy Van Voorhis for appellant.

Theodore Bacon for respondent.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
ELIZUR V. FOOTE et al., as Executors, etc.

(Submitted December 21, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 17, 1893, which affirmed a decree of the Surrogate's Court of New York county settling the accounts of the executors of Henry S. Valentine, deceased.

James F. Malcolm and *James B. Lockwood* for appellants.

John Delahunty for respondents.

Agree to affirm on opinion below.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

In the Matter of Proving the Last Will and Testament of
AUGUSTUS NELSON, Deceased.

(Argued December 21, 1893; decided January 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 16, 1893, which affirmed a decree of the Surrogate's Court of Westchester county admitting to probate the will of Augustus Nelson, deceased.

E. C. Neil for appellant.

Clarence H. Frost for respondents.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

GEORGE EASTMAN, Appellant, v. THE STATE OF NEW YORK,
Respondent.

(Argued December 22, 1893; decided January 16, 1894.)

APPEAL from decision of the Board of Claims, made November 16, 1893, awarding the appellant "nothing" upon a claim presented against the state.

L. H. Northup for appellant.

S. W. Rosendale, Attorney-General, for respondent.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., not sitting.

Award affirmed.

JAMES C. McDONALD, Appellant, v. THE STATE OF NEW YORK,
Respondent.

(Argued December 22, 1893; decided January 16, 1894.)

Argued and decided with *Eastman v. The State* (*supra*, page 562).

MARY E. POST, as Administratrix, etc., Appellant, v. HENRY H. ISHAM, Individually, etc., et al., Respondents.

(Argued December 21, 1893; decided January 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Alfred Ely for appellant.

Frederic A. Ward for respondents.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

JACOB COHN, Respondent, v. CHARLES A. BALDWIN,
Defendant; FRANK E. BALDWIN, Appellant, et al.

Where an order of General Term affirming an order of Special Term which denied a motion for a bill of particulars, does not state the ground for the denial, it will be assumed that it was in the exercise of the discretion of that court, and so, the order may not be reviewed here. The opinion of the General Term may not be looked to to ascertain the ground.

(Argued January 15, 1894; decided January 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 6, 1893, which affirmed an order of Special Term denying a motion for a bill of particulars.

The following is the opinion in full:

"The defendants made a motion at Special Term that the plaintiff be required to furnish their attorneys a bill of particulars of the claims set forth in his complaint. The motion was based upon the complaint and an affidavit of one of the defendants' attorneys, and was opposed upon an affidavit

made by the plaintiff. The court denied the motion and its order was affirmed by the order of the General Term.

"It does not appear from the orders upon what ground the courts below proceeded in denying the motion. We cannot look at the opinion of the General Term for that ground, and as they could have denied the motion in the exercise of their discretion upon facts appearing, we must assume that it was so denied; and that we have no jurisdiction to review the exercise of their discretion has been held many times by this court.

"The appeal must, therefore, be dismissed."

Charles H. Mills for appellant.

Mark Cohn for respondent.

Per Curiam opinion for dismissal of appeal.

All concur.

Appeal dismissed. _____

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154	498

JUAN LUIS DAMMERT et al., as Ancillary Executors, etc.,
Respondents, *v.* WILLIAM HENRY OSBORN et al., Appellants;
THE SOCIEDAD DE BENEFICIENCIA DE LIMA, Respondent.

In determining as to the validity of a foreign will, disposing of personalty, it is immaterial whether the testator was a citizen of the country where the will was executed or of this state; if the former was his domicile at the time of his death its laws will control.

The courts of this state may not annul a disposition of personal property in a foreign will, valid by the law of the testator's domicile, and distribute the property to claimants here, contrary to the terms of such disposition.

It seems, when our courts cannot give effect to such a testamentary disposition without violating our laws or public policy, the property should be remitted to the jurisdiction of the domicile.

It is not to be assumed because a fact appearing in the record or authority cited on argument in this court which is deemed important by counsel, is not noticed or commented on in the opinion that it has not been considered and due weight given to it in arriving at the decision, and the omission to notice it is not ground for a motion for re-argument.

(Argued January 15, 1894; decided January 23, 1894.)

THIS was a motion for a re-argument. For report of the case see 140 N. Y. 30.

The following is the opinion in full.

"The defendant, the *Sociedad de Beneficiencia de Lima*, moves for a re-argument in this case. It did not appeal from the judgment of the General Term to this court, and the decision below did not confer upon it any right or title to the fund which the will of José Sevilla has devoted to the founding of a charitable institution in New York. On the contrary, the Supreme Court refused distinctly to hold that this defendant had acquired any title or interest in the fund under the will, upon which alone its claim is based. As it made no appeal from that judgment it must be deemed to have acquiesced in the decision in so far as it was adverse to its claim. The only standing that it had in this court at the argument was not as an appellant, but as a respondent, to sustain the judgment below, which held that the bequest in the will was void here, and that the fund should be remitted to Peru, the principal seat of administration. It has admitted in its answer that by the law of Peru, the domicile of the testator, the provisions of the will are valid, and if so it is somewhat difficult to see what it has to gain by remitting the fund to that country or how it is interested in such a question. Assuming, however, that it had the right to insist in this court that the judgment below, though adverse to all of its substantial claims, should have been upheld, we are brought to the grounds upon which it asks for a re-argument of the appeal. The motion assumes that various facts appearing in the record and certain authorities upon the briefs have been overlooked. The only ground, apparently, for this assumption seems to be that they have not been specifically noticed or commented upon in the opinion. It would seem to be unnecessary to state, what every member of the bar must know, that to do that would impose upon the court an amount of useless labor, quite unreasonable to expect, and would swell opinions, which should only express the reasons of the court for its conclusions as concisely as possible, into essays on each subject involved in the appeal. It does not follow that because a fact or an authority, deemed important by counsel, has not been noticed or commented upon in the opinion, that it has not been considered and due weight given to it in arriving at the decision. In many cases facts incorporated in the record

and discussed at length by counsel are considered by us wholly unimportant, and authorities from which long quotations are made inapplicable.

“This motion will serve as a good illustration of this remark. The first ground mentioned is that we have overlooked the fact that the testator was a citizen of the United States and of this state. It was not overlooked, but we did not consider the fact as of the slightest importance, and do not now. Moreover, the learned counsel who makes the motion nowhere in his brief attempts to show how it is. It was conceded in the pleadings and on the argument that the testator was at the time of his death domiciled at Lima in Peru. The will was made and proved there, and from the beginning to the end of the argument it was conceded to be, what it certainly was, a Peruvian will. It was utterly immaterial, therefore, whether the testator was a citizen of this country or of Peru, or a subject of some other country. The domicile of the testator was the important fact, and there was no dispute about that, and is none now. Sometimes the domicile of a party becomes an important question of fact, and then the fact that he is a citizen of some other country or has a residence there bears upon the inquiry, but such facts have no significance whatever in a case where the domicile is fixed by the admission of the parties, as it has been in this case. The next ground for this motion assumes that we have omitted to notice that the statute incorporating the Sevilla Home contains the following provision: ‘Nothing herein contained shall affect the rights of any parties to an action now pending, or any heir at law or residuary legatee of said José Sevilla, deceased.’

“It was not overlooked, but, on the contrary, we held that any right which had vested in the defendant or heirs, next of kin or legatees, could not be affected by the act. But it was not claimed that any such right had vested or could vest under the law governing the will, and the concession that the dispositions in favor of the Sevilla Home were valid, under that law, implied just the contrary. If these were valid, as thus admitted, how could the fund vest in other parties, except for the charitable purposes contained in the will? The learned

counsel is certainly mistaken in supposing that this provision of the statute limited the parties to such rights only as they had before it was passed, or at the commencement of the action. If this were so then the legislation would have no practical effect whatever. It conferred additional power upon the trustees because it converted them into a corporate body with capacity to take and administer the gift. The corporation did not exist when the action was commenced and became a party after the statute was enacted, by supplemental process and pleading, and its rights and interests then related back to the will and to the time of the testator's death. This provision of the statute simply means that the interests, if any, which vested in heirs, next of kin or legatees upon the death of the testator, or subsequently, should not be affected, and as they had no interest under the law of the domicile the judgment does not contravene the statute.

"The other grounds stated in support of the motion are that we have overlooked certain authorities in support of the position that the rights of the defendant are to be determined by the law of this state. We think that none of the cases referred to hold that a valid disposition of property at the domicile of the owner may be declared void by the tribunals of another country, where the law is different, and the title adjudged to be in another. The contrary was held in the case of *Cross v. United States Trust Co.* (131 N. Y. 342). Had Mr. Sevilla died intestate this defendant could not take any part of his estate under the intestacy laws of this state, or those of Peru, so that it is in the attitude of insisting that this is a valid will, at least to prevent intestacy. But it also insists that by the will it was to take this fund in case certain conditions there mentioned existed. The courts below, however, have refused to find that any of these conditions did exist, or that the defendant is under any circumstances entitled to the fund, and by not appealing from that part of the judgment it has acquiesced in it, and elects to come to this court as a respondent in support of a decision that simply remits the fund to Peru, a result that does not help the defendant's contention unless it can procure a more favorable judgment under the laws of that country, which is not suggested. The fundamental error

that pervades all the reasoning of the learned counsel on this subject is to be found in the assumption that the courts of this state can annul a disposition of personal property in a foreign will, valid by the law of the domicile, and distribute the property to claimants here, contrary to the terms of such disposition, as interpreted by the law under which it was made. No controlling authority can be found in support of such a proposition. When our courts cannot give effect to testamentary dispositions of property in foreign wills without violating our laws or public policy, the property should be remitted to the jurisdiction of the domicile to the end that it may administer its own laws. But if there is no law or public policy here that forbids the execution of the purpose that the testator had in view, then our courts will give effect to the disposition according to the law under which it was made. We are still of the opinion that the legislature intended to and did remove all these objections, and so changed our laws and public policy, so far as they were ever in the way, with respect to this particular bequest, as to permit, if not require, our courts to give effect to the testator's purpose.

"The motion should be denied, with ten dollars costs."

David Milliken, Jr., for motion.

Wm. G. Choate opposed.

O'BRIEN, J., reads for denial of motion.

All concur.

Motion denied.

SUSAN B. YERKES, Appellant, *v.* CHARLES McFADDEN, Sr.,
et al., Respondents.

(Submitted January 15, 1894; decided January 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made December 9, 1892, which reversed an order of the county judge of Schuyler

county directing a sale of chattels seized under a warrant of attachment issued in this action.

John M. Roe for appellant.

O. P. Hurd for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

CITY OF SYRACUSE, Respondent, *v.* JOHN CORNWELL, Jr., et al.,
Appellants.

(Argued January 15, 1894; decided January 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made September 14, 1893, which affirmed an order of Special Term directing the continuance of a temporary injunction.

Louis Marshall for appellants.

C. L. Stone for respondent.

Agree to affirm; no opinion.

All concur, except EARL, O'BRIEN and BARTLETT, JJ., dissenting.

Order affirmed. _____

JOHN B. SOLLEY, Respondent, *v.* JOHN B. McGEORGE,
Appellant.

(Argued January 15, 1894; decided January 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 2, 1893, which affirmed an order of Special Term denying a motion to compel plaintiff to vacate judgment against the defendant and receive an answer.

L. A. Chandler for appellant.

E. Luther Hamilton for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

**ALLAN C. DALZELL, Appellant, v. THE FAHYS WATCH CASE
COMPANY, Respondent.**

(Argued January 15, 1894 ; decided January 30, 1894.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made October 24, 1893, which affirmed an order of Special Term denying a motion by plaintiff for a discovery and inspection of defendant's books.

Edmund T. Oldham for appellant.

William A. Jenner for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed. _____

**WILLIAM J. BREWSTER, Appellant, v. GEORGE H. WOOSTER,
Respondent.**

(Argued January 15, 1894 ; decided January 30, 1894.)

APPEAL from order of the Superior Court of the city of New York, made December 5, 1893, which denied a motion by plaintiff to dismiss an appeal by defendant from a judgment entered upon a verdict in favor of plaintiff.

William H. Arnoux for appellant.

Thomas G. Shearman for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

CHARLES KIBLER, as Administrator, etc., et al., Appellants, *v.*
LEVI L. MILLER et al., Respondents.

(Argued January 17, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 19, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

J. M. Humphrey and *William B. Hoyt* for appellants.

Philip A. Laing for respondents.

Agree to affirm on opinions below.*

All concur.

Judgment affirmed. _____

MANN'S BOUDOIR CAR COMPANY, Respondent, *v.* **WILLIAM SHAW**, Receiver, etc., Appellant.

(Argued January 18, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 12, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Charles E. Patterson for appellant.

G. W. Cotterill for respondent.

Agree to affirm on opinion below.†

All concur, except **FINCH** and **PECKHAM**, JJ., dissenting, and **ANDREWS**, Ch. J., not voting.

Judgment affirmed.

* 57 Hun, 14.

† 69 Hun, 245.

In the Matter of Proving the Last Will and Testament of
ROXALANA WILLIAMS, Deceased.

NORMAN CARPENTER, as Executor, etc., Respondent, v. JULIUS
HALL, as Administrator, etc., Appellant.

(Argued January 19, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 2, 1892, which affirmed a decree of the Surrogate's Court of Rensselaer county admitting to probate the will of Roxalana Williams, deceased.

R. A. Parmenter for appellant.

Charles E. Patterson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JAMES WALTER CRYSTAL, an Infant, etc., Appellant, v. THE
TROY AND BOSTON RAILROAD COMPANY, Respondent.

(Argued January 19, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 15, 1893, which affirmed a judgment in favor of defendant entered upon an order of the court nonsuiting plaintiff on trial at Circuit.

R. A. Parmenter for appellant.

T. F. Hamilton for respondent.

Agree to affirm on previous opinions of this court in same case. (105 N. Y. 164; 124 id. 519.)

All concur.

Judgment affirmed.

**EDWARD PETTINGILL, Respondent, v. THE TOWN OF OLEAN,
Appellant.**

(Argued January 19, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Frederick W. Kruse for appellant.

Alfred Spring for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

**THE NEW YORK RUBBER COMPANY, Appellant, v. JOHN
ROTHERY et al., Respondents.**

(Argued January 22, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 8, 1893, which affirmed a judgment in favor of defendant entered upon a verdict, and affirmed an order denying a motion for a new trial.

B. F. Lee for appellant.

H. H. Hustis for respondents.

Agree to affirm; no opinion.

All concur, except GRAY, J., dissenting.

Judgment affirmed.

HARTWELL ABBEY, Respondent, *v.* LEVI H. MACE et al.,
Appellants.

(Submitted January 23, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made June 6, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and which also affirmed an order denying a motion for a new trial.

Martin J. Keogh for appellants.

Albert A. Abbott for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

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ISAAO ALTMAN et al., as Administrators, etc., Respondents, *v.*
GABRIEL WILE, as General Guardian, et al., Impleaded, etc.,
Appellants.

(Argued January 25, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1892, which reversed and granted a new trial as to the defendant Eli Hofeller, and affirmed as to the other defendants a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to obtain a judicial settlement of the accounts of the defendant Gabriel Wile, as general guardian of the property of Eli Hofeller, an infant, and as administrator of the estate of Lily Hofeller, deceased, and of the accounts of Schanette Wile and Lehman Hofeller, as administrators of the estate of Sigmund Hofeller, deceased, and for further relief.

The following is the opinion in full :

"A full and accurate statement of the facts of this case is not easy to make. I will, however, make a brief statement sufficiently accurate and full for the present purpose.

"Sigmund Hofeller died at Buffalo intestate in January, 1875, leaving a widow, Schanette, and two children, Eli and Lily, both infants. Lehman Hofeller and the widow were appointed administrators, and Abraham and Jacob Altman became sureties on their administration bond. The estate left by the intestate was about \$21,000, which was soon converted into cash, and about \$15,000 of it was loaned to Abraham Altman, with no security but his individual notes, and he became insolvent in August, 1881, without having paid the notes. Lehman Hofeller became insolvent about the same time, and he died in December, 1886. Lily Hofeller died in 1877, and thereafter the estate of the intestate belonged equally to his widow and his son Eli. The widow married Gabriel Wile in January, 1880, and in September, 1881, he was appointed guardian of Eli and administrator of Lily's estate, and gave the requisite bonds in both capacities, with sureties. In February, 1888, Eli became of age. Jacob Altman died in November, 1881, and his administrators bring this action, and they have made parties defendant all the persons in any way interested in the estate of Sigmund Hofeller, to wit, the surviving administratrix, the executors of the deceased administrator, Eli Hofeller and his guardian, and the administrator of Lily Hofeller's estate. The plaintiffs allege, among many other things, that the defendants are by collusive proceedings and accountings in the Surrogate's Court and by other manipulation of the assets of Sigmund Hofeller's estate trying to make the estate of Jacob Altman, deceased, by reason of his signature to the bond of the administrators of Sigmund Hofeller's estate, responsible substantially for the whole estate which came to the hands of such administrators; and that the real responsibility of Jacob Altman's estate could be ascertained. They prayed, among other things, for relief in this action, that the administrators of Sigmund Hofeller's estate, and that Gabriel Wile, as guardian of Eli Hofeller and as administrator of Lily Hofeller, should render their accounts,

and that such accounts should be settled and adjusted. An interlocutory judgment was entered in the action directing the accounting, and then a referee was appointed to take the accounts. The matter was brought to a hearing before the referee, and he made his report, in which he found, among other things, that Mrs. Wile, as administratrix, became responsible for the whole estate left by Sigmund Hofeller, and that she is accountable as such for \$36,241.84; that she is entitled to credit against that amount for the sum of \$34,869.94 paid to and received by Gabriel Wile as general guardian of Eli Hofeller; that Mr. Wile as such general guardian is chargeable with the latter sum, against which he is entitled to credit for the sum of \$1,051.21 paid and expended for his ward, leaving a balance in his hands of \$33,818.73; that of this amount there is due Eli, to be paid to him by his guardian, the sum of \$18,120.21. Judgment was entered upon the report settling the accounts as therein stated, and discharging and releasing the plaintiffs as administrators of the estate of Jacob Altman from all liability by reason of the administration bond. This conclusion was reached because Mrs. Wile being responsible for the whole estate and any devastavit thereof could not enforce the administration bond against her own sureties for her own benefit; and as to Eli Hofeller, because his guardian had received his share of the estate and had become responsible therefor.

“From this judgment Eli, Gabriel, and Mrs. Wile appealed to the General Term, and there the judgment was affirmed as to Mr. and Mrs. Wile, and reversed as to Eli, and a new trial ordered. The order of reversal contains the following provision: ‘But that the settlement of the accounts of Schanette Wile and Lehman Hofeller, as administratrix and administrator of Sigmund Hofeller, deceased, by the referee in this action, and the judgment therein shall be of no force and effect as against said Eli Hofeller in the further proceedings in this action.’ The General Term seemed to reach the conclusion that the judgment was wrong as to Eli, because it discharged Mrs. Wile from responsibility for the estate of her intestate so far as by her action or permission that estate had come to the hands of Gabriel as guardian of Eli, and thus

confined Eli for his share of the estate to his remedy against his general guardian and the sureties upon his bond. So far as we are informed by this record the case has not been re-tried as to Eli, and the appeal to this court is by Mr. and Mrs. Wile alone.

"We are not concerned now with the rights or interests of Eli, and the attitude he may occupy upon the new trial and his relation to the judgment which stands against the other two defendants. No one is here complaining of the judgment for him, and we are simply to determine whether there is anything in the judgment of which these appellants can complain.

"The defendants have no fight between themselves. The judgment grants no relief as between them, and they do not complain that any error has been committed or injustice done as between themselves. They make common cause against the plaintiffs, and upon the appeals to the General Term and to this court the plaintiffs are the sole respondents.

"Upon the argument in this court no complaint was made of any error in the judgment affecting Mrs. Wile. The sole complaint was made on behalf of Gabriel Wile, and for him it was objected that he had in the accounting been improperly charged with several items. We have carefully examined the record and find sufficient evidence to sustain all the items thus objected to but one, and that is an item of \$3,320 and interest thereon, amounting to \$1,659.90, making together the sum of \$4,979.90. The learned counsel for the appellants claims that there was no evidence to charge Gabriel as guardian with this item. The history of the item is as follows: In September, 1881, Lehman Hofeller having become insolvent executed a mortgage upon certain real estate for \$3,320, to Isaac A. Wile as guardian for certain minor children of Lehman; and at the same time he executed a mortgage upon the same real estate for \$15,220 to Mrs. Wile as administratrix to secure the payment of the notes of Abraham Altman hereinbefore mentioned. By the terms of this mortgage it was expressly made subject and secondary to the prior mortgage. The real estate mortgaged was worth about \$6,500. Subsequently a judg-

ment creditor of Lehman Hofeller commenced an action, among other things, to set aside the first mortgage on the ground that it was fraudulent and void as to the creditors of Lehman Hofeller, and in that action it was found that it was without any consideration, legal or equitable, to uphold it as against the judgment creditor, and that it was void and invalid against its judgment. But it was found that the second mortgage was founded upon a good consideration and was valid. The evidence shows that Mrs. Wile attempted to get a first mortgage upon the real estate, but that Lehman refused to give it, and would only give the second mortgage. The court, in the creditors' action, by its judgment declared that the creditors should be subrogated to the rights of the first mortgagee. After the decision of that action, but before the entry of the judgment therein, it appears that the claims of the judgment creditor were, with the consent of Mr. and Mrs. Wile, assigned to Wile, Brickner and Wile, and thereupon the court, in its final judgment, ordered Isaac A. Wile to assign the mortgage to them to be enforced by them under the right of subrogation for their benefit. In pursuance of that judgment they foreclosed that mortgage and sold the real estate, and it is claimed that Gabriel in some way had the benefit of the amount due upon that mortgage, and that he should be charged with the amount of the same and the interest. Mrs. Wile, as the holder of the second mortgage, could not attack the first mortgage as her mortgage was made expressly subject and secondary to it. The first mortgage was not void as to her, but was void as to the creditors of the mortgagor. They could assail it, and neither Mrs. Wile nor her husband could defeat the right of such creditors to be subrogated to that mortgage. But Gabriel Wile was charged with the amount of that mortgage and the interest due thereon upon the theory that he and his wife had in the creditors' action voluntarily consented that the first mortgage which had been declared void should nevertheless be the first lien and have the preference over the second mortgage. But of this there is no adequate proof. The only evidence of such consent to which our attention has been called and which we are able to find in this record is found in the decision made in the creditors' action.

There we find in the findings of fact as follows: 'That the mortgage given, to said defendant Schanette Wile as administratrix, as expressed in the body of the mortgage, was given upon the understanding that the same should be a second and inferior lien to the said mortgage given to the said Isaac A. Wile as guardian as aforesaid, and in this litigation she recognizes that mortgage as a prior lien and is willing it should stand and be upheld as valid.' And in the findings of law as follows: 'The said mortgage, given by the said Lehman Hofeller to the said Isaac A. Wile as guardian as aforesaid, being without consideration, legal or equitable, to uphold the same as against the plaintiffs' judgments, is adjudged invalid and void as to the plaintiffs' judgments, but as it is recognized as a superior lien to the said mortgage given to said Schanette Wile as administratrix, etc., the plaintiffs are entitled to be subrogated to the lien of said mortgage given to the said Isaac A. Wile, as guardian, etc., as aforesaid, to the amount of said mortgage and interest.'

"The language used in these findings does not show that the decision as to the first mortgage was based upon Mrs. Wile's consent. She was bound to recognize that mortgage as a prior and superior lien, and whether she was willing or unwilling the judgment creditor was entitled to the subrogation. Her attitude toward the prior mortgage could make no difference, and no one can say from the record alone that it did make any difference.

"But assuming that there was error in charging Mr. Wile with this item, the error was innocuous and the relief granted to the plaintiff would necessarily have been the same if that item had not been charged to Mr. Wile. Deduct from the amount charged to him on the accounting this item of \$4,979.90, and there will still remain a balance of \$28,838.83, larger by more than \$10,000 than is needed to answer any claim of his ward, and thus it is clear that the plaintiffs were, with this item left out, entitled to all the relief they obtained in this action, to wit, release as between them and the appellants from liability on the administration bond, and from actions by them based thereon.

"The judgment should, therefore, be affirmed, with costs against the appellants personally."

William F. Cogswell for appellants.

Norris Morey for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

MARY CLUFF, Suing on her Own Behalf, etc., Respondent, v.
HENRY S. DAY et al., Appellants.

Where the law of a case has been determined after full argument and consideration by the Second Division of this court, and upon a second appeal substantially the same facts appear, not changed in any material respect, the questions of law will not be considered, but the parties will be held as concluded by the former decision; at least where the case affects no general public interest, and the decision so made establishes no doctrine in hostility to the previous law as declared by this court, and this, it seems, although if the case was *res novo*, the court might be of the opinion that the law of the case was erroneously adjudged.

(Argued January 26, 1894; decided February 6, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 3, 1893, which overruled defendant's exceptions and ordered judgment in favor of plaintiff upon a verdict directed by the court.

This action was brought by plaintiff on her own behalf and on behalf of all others interested in the estate of Burgess Cluff, late of New York city, deceased.

The nature of the action and the facts, so far as material, are set forth in the opinion, which is given in full.

"This is a suit to charge the sureties on a bond of a non-resident executor with the sum adjudged by a decree of the surrogate of the city and county of New York, made in 1886, on an accounting by the executor, to be due from him to the estate of the decedent. The case has been twice tried, and this is the second appeal to this court. On the first trial the defendants had judgment in their favor on the ground that a decree made by the surrogate on a

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142	81
141	580
145	229

141	580
161	485

former accounting in 1873 changed the character in which the executor had up to that time held the funds and property of the estate, and that he thereafter held them in his character as trustee, and that the devastavit by which the property of the estate was wasted and lost occurred after the decree of 1873, and was, therefore, not covered by the undertaking of the sureties, which related only to the acts of the executor as such. The judgment of the trial court on the first trial having been affirmed by the General Term, an appeal was taken to this court, and was heard before the Second Division, which reversed the judgment below, and ordered a new trial (124 N. Y. 195). The judgment of the Second Division was placed on the ground that the accounting and decree in 1873 did not terminate the executorial duties of the executor or change the character in which he held the property, but that until the decree of 1886 he continued to hold it as executor and not as trustee, and that, therefore, the sureties were liable for a failure of their principal to pay the sum adjudged against him by the decree on the second accounting. On a new trial a verdict was directed for the plaintiff for the amount adjudged by the decree of 1886, with interest. The General Term, on appeal, affirmed the judgment entered pursuant to the verdict on the second trial, and this appeal is taken from the judgment of affirmance.

"We are asked to review and reverse the judgments so rendered by the courts below, although they were rendered in precise conformity with the principles upon which the former decision in this court proceeded. It is insisted that the Second Division of this court erred in its construction of the decree of 1873, and in adjudging that the character in which the property was held by the principal of the defendants was not thereby changed.

"The facts were not changed in any material respect on the second trial. All the material facts bearing upon the liability of the sureties, presented by the present record, were in the record on the former appeal. The law of the case was determined after full argument and consideration by the Second Division of this court. It would be contrary to the general rule and present an unseemly spectacle for this court in

the same case, between the same parties, upon substantially identical facts, to reverse a judgment rendered by a co-ordinate branch of this court upon a full understanding of the facts and of the question of law involved, even although if the case was *res novo* we might be of the opinion that the law of the case was erroneously adjudged.

“The state has constituted courts of different grades for the ascertainment of public and private rights, and to afford an opportunity for the correction of errors it has arranged a system of appellate courts, and has vested the final jurisdiction in this court. There is no exemption in any tribunal from the infirmities of human judgment. But the state has an interest that controversies in the courts should at some time come to an end, and, when submitted to the final arbitrament, that the judgment rendered should be accepted as the final determination of the right in controversy. The court may proceed upon erroneous views of the facts or the law. But to permit the parties to an action to re-open a discussion on the law or the facts once deliberately determined by the court of last resort, on a subsequent appeal in the same case, on a suggestion of error in the former decision, would encourage litigation and diminish respect for judicial tribunals, which it is of the highest importance should be maintained. There is no iron rule which precludes a court from correcting a manifest error in its former judgment, or which requires it to adhere to an unsound declaration of the law. It may, for cogent reasons, reverse or qualify a prior decision, even in the same case. But the cases in which this will be done are exceptional, and the power should be sparingly exercised. Where by inadvertence a settled principle of law is supposed to have been overlooked, or a rule of property violated, the court affords by its rules an opportunity to have its attention again called to the matter before final judgment is entered. If the party against whom the judgment is rendered omits to avail himself of this opportunity, or if, having applied for a re-argument, the application is denied and the case goes to a new trial on the law as declared, the circumstances must be very unusual which would justify the court in reversing its decision on a second appeal in the same case and upon the same facts. The decision is a prec-

edent upon the point of law involved which the court may or may not follow in cases subsequently arising, but in the particular case it is 'more than authority — it is a final adjudication' between the parties.

"We are not to be understood as in any respect questioning the soundness of the decision on the former appeal. We decline to consider the question. It depended upon the construction to be given to certain acts and documents, all of which were before the court and taken into consideration. It affected no general public interest, nor did it establish any doctrine in hostility to the previous law as declared by this court. If there was any error at all, it was in the application of admitted principles to the circumstances of the particular case. This court, following the general trend of judicial authority, has frequently refused to re-consider in the particular case its prior decision, on the ground that the parties were concluded thereby, and this rule has been followed where the first decision was by the Commission of Appeals. (*Oakley v. Aspinwall*, 13 N. Y. 500; *Justice v. Lang*, 52 id. 323; *Terry v. Wait*, 56 id. 91; *Joslin v. Cowee*, Id. 626; *Williamsburgh Bank v. Solon*, 136 id. 465, 477.)

"The new points raised are not well taken and do not require special reference.

"The judgment should be affirmed, with costs."

Chas. A. Collin for appellants.

Edward B. Whitney for respondent.

ANDREWS, Ch. J., reads for affirmance.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JAMES CONNOR, Appellant.

(Argued January 24, 1894; decided February 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 17, 1893, which affirmed a judgment of the

Court of General Sessions of the Peace entered upon a verdict convicting the defendant of the crime of receiving stolen goods, knowing them to have been stolen.

F. M. Danaher for appellant.

John D. Lindsay for respondent.

Agree to affirm on opinion of FOLLETT, J., below.*

All concur, except ANDREWS, Ch. J., EARL and BARTLETT, JJ., dissenting.

Judgment affirmed. _____

HORACE J. ALLEN, Respondent, *v.* GEORGE C. CLARK,
Appellant.

(Argued January 24, 1894; decided February 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Louis Hasbrouck for appellant.

E. H. Neary for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THE PEOPLE *ex rel.* GEORGE R. VAN ALSTYNE, Appellant, *v.*
BURTON H. DAVY, as Sheriff, etc., Respondent.

(Argued January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made January 18, 1893, which affirmed an order dismissing a writ of habeas corpus

and remanding the relator to the custody of the sheriff of Monroe county.

H. B. Hallock for appellant.

Howard H. Widener for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

WILLIAM T. REYNOLDS et al., Appellants, v. WILSON S. HORTON, Respondent.

(Argued January 29, 1894 ; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 13, 1893, which affirmed an order of the county judge of Columbia county vacating an attachment issued in behalf of plaintiffs.

Milton A. Fowler for appellants.

A. V. S. Cochrane for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

MARGARET COBY, Respondent, v. FRANK IBERT, Appellant.

(Submitted January 29, 1894 ; decided February 27, 1894.)

APPEAL from order of the General Term of the City Court of Brooklyn, made November 29, 1893, which affirmed an order of Special Term denying a motion to vacate admission of service of amended complaint.

Moffett & Kramer for appellant.

H. G. Lansing for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

MARGARET COBY, Respondent, v. FRANK IBERT, Appellant.

(Submitted January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the City Court of Brooklyn, made November 29, 1893, which affirmed an order of Special Term denying a motion to strike out an amended complaint.

Moffett & Kramer for appellant.

H. G. Lansing for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

MELVIN STEPHENS, Respondent, v. ROBERT LEWIS HUMPHRIES
et al., Appellants.

(Submitted January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 17, 1893, which affirmed an order of Special Term granting a motion by plaintiff overruling objections of purchaser at foreclosure sale and directing him to complete sale.

Dennis McMahon for appellants.

Albridge C. Smith for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed. _____

In the Matter of the Distribution of the Surplus Moneys in
Foreclosure of Mortgage on Real Estate of SARAH LAW-
RENCE HAZARD, Deceased.

(Argued January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 17,

1893, which affirmed a decree of the Surrogate's Court of the city and county of New York confirming the report of a referee in surplus money proceedings.

John J. Crawford for appellant.

L. A. Lockwood and *John D. Taylor* for respondents.

Agree to affirm on opinion below.

All concur.

Order affirmed. _____

RICHARD DEEVES, Appellant, v. THE METROPOLITAN REALTY COMPANY of the City of New York, Respondent.

(Argued January 29, 1894; decided February 27, 1894.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made December 4, 1893, which reversed an order of Special Term denying a motion by defendant that certain issues of fact arising on counterclaims set up in the answer be settled for trial by jury and directed said issues to be stated.

David Thornton for appellant.

Charles J. Hardy for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed. _____

HENRY W. WEDGE, Respondent, v. JAMES W. McMAHON et al., as Executors, etc., Appellants.

(Submitted January 31, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed an order of Special

Term denying a motion for a new trial and directed judgment in favor of plaintiff upon a verdict.

William H. Henderson for appellants.

Nash, Rich & Willson for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

HERMAN GERNAU, as Administrator, etc., Appellant, *v.* THE OCEANIC STEAM NAVIGATION COMPANY, Limited, Respondent.

(Argued January 31, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the June term, 1893, which affirmed a judgment in favor of defendant entered upon an order of the court on trial at Circuit dismissing the complaint.

Charles Steckler for appellant.

Everett P. Wheeler for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JAMES TEN EYCK et al., Appellants, *v.* THE RECTOR AND INHABITANTS OF THE CITY OF ALBANY IN COMMUNION WITH THE PROTESTANT EPISCOPAL CHURCH, etc., in the State of New York, Respondent.

(Argued January 31, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the second Tuesday of May, 1892, which directed judgment in favor of defendant upon a case submitted under the Code of Civil Procedure (§ 1279).

Arthur L. Andrews for appellants.

Abraham Lansing for respondent.

Agree to affirm on prevailing opinions below.*

All concur.

Judgment affirmed. _____

CHARLOTTE E. PATTEN, Respondent, *v.* UNITED LIFE AND ACCIDENT INSURANCE ASSOCIATION, Appellant.

(Argued January 31, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 30, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

Edward T. Oldham for appellant.

J. A. Shoudy for respondent.

Agree to affirm on opinion below.†

All concur.

Judgment affirmed. _____

ABEL A. CROSBY et al., Survivors, etc., Respondents, *v.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

It is not error for a trial court to refuse to charge the jury as to the effect upon certain evidence if certain other evidence is believed by them, and to relegate the whole matter to the jury.

So also a refusal to charge that the intent of one of the parties to a transaction determines its legal effect, and a charge that the intention with which a thing is done does not always control its legal effect were proper.

When question as to whether a transaction is a sale or bailment is one of fact for a jury.

(Argued January 31, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon

* 65 Hun, 194.

† 70 Hun, 200.

an order made November 22, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

The following is the opinion herein in full :

"This action, which, for the third time, is brought to our attention, was instituted to recover the value of a quantity of lumber, wrongfully taken and converted, as the plaintiffs allege, by the defendant. It had been transferred to plaintiffs by the firm of G. & E. Harnden, in payment of an indebtedness. The Harndens were engaged in the business of boat building upon the Delaware and Hudson Canal and, in November, 1882, had contracted with the defendant to build two canal boats, during the coming winter, for delivery in the spring. In pursuance of an order from them, the defendant, subsequently to the making of the contract, delivered at their yard lumber of the quality and quantity requested. The contract between the parties as to the building of the boats contained no obligation as to the ordering or the supplying of any lumber. When the lumber was sent, the defendant forwarded to the Harndens one of their printed bills, or a memorandum with blank spaces to be filled in by writing; headed: 'Rondout, N. Y., Nov. 24, 1882. Messrs. G. & E. Harnden to the Delaware and Hudson Canal Co. Dr.;' and thereafter specifying the number of feet, the kinds, sizes and prices of the lumber and the sum of the indebtedness. In December following, the Harndens failed and applied their various properties toward the discharge of the claims of creditors; transferring, as it has been said, this lumber to the plaintiffs by means of a bill of sale.

"The defendant, claiming to have always retained its ownership of the lumber, introduced evidence for the purpose of showing that the lumber had been furnished to the Harndens only to be used in the boats contracted for; payment to be made for it by deduction of its value from the price of the boats upon their completion in the spring. It was shown that it was the custom for the defendant to furnish its own lumber to boat builders generally, but solely for the purpose of being used in the construction of boats it had contracted for, and with the understanding that its cost was to be taken out when the boats were paid for. The evidence tended to show that

this custom was known to the Harndens and that, while in former years they had made cash payments for lumber obtained of the defendant, for some few years prior to this transaction, in November, 1882, they had maintained similar contractual relations with defendant in the building of boats; ordering lumber of the defendant for the purpose of being put into boats and having its cost deducted from the contract price of the boats. The defendant has contended that the transaction between it and the Harndens, in the furnishing of this lumber, constituted a bailment only of the lumber and not a sale; and that its title to it was never to be severed until the lumber was actually used in the construction of the boats. Upon the first trial, the trial judge followed that view and nonsuited the plaintiffs. When from that trial it came here, we held that, upon the evidence, whether it was a bailment or a sale of the lumber was a question for the jury to determine. We thought that the bill, or memorandum, sent with the lumber, was some evidence that the transaction was understood as a sale and that the custom of the defendant in supplying its lumber was not necessarily inconsistent with a sale. (119 N. Y. 334.) Upon a subsequent trial the plaintiffs recovered a verdict and when the case came here again, upon the defendant's appeals, the judgment was reversed and a new trial ordered; because of error in the exclusion of evidence offered by the defendant, in the testimony of the agent, who sent the bill of sale, or memorandum, however it may be termed, to explain the object or purpose in sending that paper. (128 N. Y. 651.) The agent was the company's paymaster, whose duty it was to send out such bills or statements, and we held that his testimony, to explain the meaning of the bill being sent to the Harndens, was not objectionable as an attempt to vary any contract between the parties. It had been made use of by the plaintiffs, as evidence of an admission by the defendant of there having been a sale of the lumber, and being, by reason of its informal character, consistent with either that view, or with the view that it was merely a statement advising the Harndens of what had been delivered under their order and of what they would have to account for, it was proper that the defendant should have whatever benefit

might result from an explanation by its agent of his object in sending it. Had the evidence, aside from this bill, established that there had been a sale, then the explanation of the purpose in sending the bill might have been improper. Such an instrument is usually deemed to be within an exception to the general rule of evidence and, for its informal and incomplete character, to be open to evidence in explanation and to throw light upon the contract between the parties. (See Phil. on Evid., C. & H.'s notes, 672; 3 Cranch, 311.) Upon the last trial, the evidence of the company's agent, in explanation of the purpose of sending the bill in question, was admitted and was to the effect that it was sent upon this occasion to the Harndens, as it had been sent to them upon previous dealings and, in accordance with the company's universal custom, to other parties, 'as a memorandum of the lumber that they had and as a memorandum of the amount that had to be deducted from the contract price of the boat when the company settled for it' and that it was not sent for any other purpose. With that explanation of the company's agent, in connection with some testimony by other boat builders that the company furnished lumber to all of them upon the same terms, and for the sole purpose described by the company's agent, the defendant's counsel insists that the case was so complete for the defendant, as to have made it the duty of the trial judge to decide the question as one of law, in favor of the defendant, and to have nonsuited the plaintiffs. That the evidence preponderates in favor of the defendant's contention, as to what the transaction amounted to, cannot be doubted and, as we have said upon the previous occasions, when the case was under review, we again say that the equities militate and the evidence tends strongly against the claim of the plaintiffs. It is difficult to understand how the jury could have come to the conclusion which they did, upon any fair and conscientious consideration of the proofs; but we cannot say that the case had been wholly removed from their province and if not, then we cannot interfere with their decision of the issue. It does not follow that, with the evidence of the company's agent in the case, however strongly supporting the company's position, the plaintiffs were foreclosed

from insisting upon the inconclusiveness of the evidence relied upon by the defendant; or upon certain opposing inferences being possible from the proofs, and that it was the province of the jury to consider and decide. Nor was anything else to be inferred from our previous opinion than that the evidence of the company's agent was admissible in its behalf upon the issues, in view of the use made of this bill by the plaintiffs and to explain the object in sending it. However convincing the evidence to the ordinary mind that the defendant was right in its contention, it cannot be said that the facts depended upon were incapable of another aspect; or that, from the circumstances out of which grew, and which bore upon, the relations of these parties, it was impossible to infer that this transaction was not a sale of the lumber.

"It is the undoubted rule that, in such actions, the plaintiff must establish his title to, and right to the possession of the property alleged to have been wrongfully converted and this was undertaken in this case. The Harndens were in possession of the lumber and, apparently from the bill rendered, were indebted for it, as upon a sale to them, and they had transferred it to plaintiffs by a bill of sale. It appeared that the Harndens had previously bought lumber of the defendant for cash and that, after an interview between a member of that firm and an officer of the company, the course of dealing was changed and credit was given to them for lumber ordered and delivered. With lumber so obtained boats of other parties were repaired and there was no proof that any restrictions were imposed upon its use. Nor did it appear that anything was said, or written, as to the title to this lumber being only conditional in the Harndens. Though its cost was to be received by the defendant only when the boats were built, and then by way of deduction from the sum contracted to be paid for the boats, that was not necessarily conclusive upon the question of the ownership meanwhile; for the title to an article may pass upon a credit sale, if such be the intention of the parties. Another circumstance was that the company was not bound to accept and to pay for the boats until after inspection and approval; thus introducing another element of possible doubt into the question of title. All these circumstances, and

some others of more or less importance, were open to the consideration of the jury, in connection with the form of the bill for the lumber, sent by the company's agent, and, as it has been already intimated, however strong may seem the inference to our minds that there was only a conditional sale, or a bailment, of the lumber, a different inference was permissible; so that, under the well-settled rule, the jury became the proper judges between the litigants, and their decision closes the dispute; in the absence of any errors committed in the course of trial, which would authorize us to order a new trial.

"The defendant's counsel requested the trial judge to charge: 'That if the jury find that the evidence given by Larter that the bill sent to the Harndens November 24th, 1882, was sent only as a memorandum of the quantity and of the quality of the lumber, and its value is true, the bill is not an admission that the lumber was sold to the Harndens.' To which request he replied: 'I decline to charge in those words, and will leave it as a question of fact, under all the evidence, for the jury to determine whether or not the lumber was sold.'

"We think there was no error in this. Larter was the company's paymaster and had testified that the bill had been sent, as previous ones had been sent; namely, as a memorandum to show the amount to be deducted from the contract price of the boats when constructed. The effect of that evidence upon the bill was for the jury to decide.

"It was not legal error for the court to refuse to say what would become of certain evidence, if certain other evidence was believed. Nor was the court bound to put the proposition to the jury, if we assume its truth, as it was formulated by the counsel. (85 N.Y. 618.) Therefore, when in his reply to the request, the trial judge simply relegated the whole matter to the jury, to be decided upon the evidence before them, he committed no error.

"In his charge he remarked that 'the intention with which a thing is done, does not always control the legal effect of the thing done.' That is very true, and did not prejudice the defendant's case. That object which one may propose to himself, in entering upon some transaction, often fails of its accomplishment by the operation and intervention of rules of law.

The judge sufficiently explained the bearing of the remark. When subsequently, upon the request of the defendant's counsel, he instructed the jury that the minds of contracting parties must meet to make a valid contract; that the question was one for the jury as to what the contract was; and that 'if from the circumstances you are satisfied that it was the intention of both parties at that time that the title should pass, that their minds met upon that, then you may treat it as a sale. If from the circumstances you do not believe that the parties' minds met you may treat it as no sale,' he made it clear enough, what part intention played in the transaction of the parties and there should have been no confusion in their minds about it.

"The trial judge refused to charge 'that the intent of Larter as to the sending of the bill * * * if Larter is believed by the jury, does determine the legal effect of the sending of the bill.' This was not error. As it has been said, Larter was following the usage in previous transactions and though his own intention in sending the bill in that form may, nevertheless, have been to treat the matter as a bailment, and the bill as a mere memorandum, that could not control the real arrangement, if it was otherwise; and to decide what that was, the facts and circumstances, taken all together, must be considered and weighed, for the absence of any definite agreement upon the subject in words, or in writings.

"We have scrupulously considered these and other rulings, upon requests to charge and upon the admission and exclusion of evidence, and we are not able to say that there exists any error which would justify us in permitting the defendant to submit its case to the chances of another trial.

"The judgment should be affirmed, with costs."

F. L. Westbrook for appellant.

S. L. Stebbins for respondents.

GRAY, J., reads for affirmance.

All concur.

Judgment affirmed.

EUGENE KELLY, Appellant, *v.* JAY GOULD et al., Respondents.

(Argued February 2, 1894; decided February 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 3, 1892, which overruled plaintiff's exceptions and directed judgment dismissing the complaint as to all the defendants, except J. Henry Work, as to whom the exceptions were sustained and a new trial ordered.

This action was brought by plaintiff, as assignee of the Milmo National Bank of Laredo, Texas, to recover damages for alleged fraud and deceit practiced upon it by defendants and by which they induced said bank to cash certain drafts drawn on the Southwest Construction Company by B. S. Wathen, its chief engineer, to pay for the work of constructing a railroad, in which defendants were alleged to be largely interested and actively engaged in promoting.

The following is the opinion in full:

"The foundation of this action is admitted to be an averment of deceit and false representation on the part of those who dealt with the bank, both directly and indirectly. That deceit had respect to the solvency of the Southwest Construction Company, upon which the drafts were drawn which the bank discounted, and which were protested for refusal of payment. The solvency of the company was not directly asserted and no specific inquiry was made about it. The bank officers did not ask who were in fact its corporators, what was the amount of its capital, how much of that had been actually paid in, or even whether it had or had not executed an actual contract with one or more railroad companies for construction. No such inquiries were made, but the bank was led to believe from what was said that the construction company had commenced the grading of the new consolidated road under the Mexican concession, and in so doing was backed and supported by Gould and Sage and other men of wealth and capital; that the money for the enterprise sought to be raised for the purpose on foreign exchanges had been in fact obtained, and that the home capitalists had promised to fur-

nish at least an equal amount. These statements were made by Sampsell, one of the contractors, who had already closed an informal contract with the Southwest Company to build the road from Laredo south to Victoria, and had commenced work in advance of formal papers in order to comply with the terms of the concession. The statement encouraged a belief in the solvency and financial strength of the Southwest Company, and was corroborated by the representation of Wathen, the engineer who drew the drafts, that they would be paid, and that the new construction company was backed by the same parties who managed the older ones; and further, by certain copies of papers which were produced and shown as evidence of the asserted fact. These papers were, first, a proposition by Sampsell, addressed to Dodge as president of the American Railway Improvement Company, that if 'the new company' would continue his present contract at the same prices to Victoria, and pay him the \$13,000 due from the Oriental Company, and allow him to put his forces 'to work at once,' he would waive his demands for lay-off, and complete the work to Victoria in a reasonable time. Indorsed on the proposition appeared these words: 'I recommend the acceptance by the new company of the inclosed proposition,' signed Jay Gould, R. Sage, U. S. Grant. The second paper produced to the bank was a letter from Dodge to Gould, which inclosed Sampsell's proposition, and gave it approval as being a 'fair one.' Each of these papers bore the date of July 9th, 1883.

- The third paper shown was dated the next day, was addressed to the contractors, and authorized them to build to Victoria upon the terms of the original contract. It was signed 'George J. Gould, president Southwest Con. Co., per J. H. Work, secretary,' but the latter had no authority whatever to sign the president's name to the paper, he at the time being in Europe, and wholly ignorant of the use made of his name. The fourth paper shown was dated July 12th, 1883, directed to Wathen as chief engineer, and signed by Work as secretary of the Southwest Company. It ordered the engineer, when he drew for the contractors' August estimate, to include the amount due from the Oriental Company. The fifth paper was dated a day earlier, and was a notification to the contractors that they had

been awarded the contract for grading the Mexican Southern railroad south to Victoria at certain named prices, the work to commence by July 14th, and was also signed by Work in the name of George J. Gould, but without authority. It was in reliance upon these papers and the statements of Wathen and Sampsell that the bank discounted the drafts which were protested. All the information which these two persons gave, so far as it concerned facts rather than mere opinions, was derived from Work. The proof tends to show that he did represent to Sampsell that the money had been subscribed abroad and was to be supplemented by an equal amount from Gould, and that the road was to be built by the parties interested in the two previously-existing companies, which were to be consolidated for the purpose of utilizing the new concession. There was thus disclosed enough to raise a question of fact as to Work, for while he had no direct communication with the bank he set in motion and was more or less responsible for the untrue and incorrect statements upon which the bank acted. The trial court so held, but dismissed the complaint as to the other defendants, and it is from that ruling, as it respects Gould, Sage and Dodge severally, that this appeal is taken, and the question is whether they became responsible for the false representations which misled the bank.

"It is not claimed that either of such defendants communicated directly with the bank officers, or ever knew of what was transpiring when the drafts were drawn, and is admitted that the inducement to their discount came primarily from Sampsell and Work: so that the burden is on the plaintiff to connect the defendants with the representations made in such manner as to attach a responsibility for their truth and liability for their consequences. And to effect that it became necessary to show, first, that the defendants made the false representations to Work and Sampsell; second, that they made them with the expectation and intention that Work and Sampsell should repeat them to parties whose money was to be obtained; and, third, that the defendants knew the statements to be false.

"None of the defendants made either to Work or Sampsell the alleged representations. None of them told Work at any

time or anywhere that the funds sought in foreign markets had been obtained. Why should they? The agency for that purpose was wholly in the control of Work, and all the knowledge possible was his. They said nothing about it relative to the facts occurring because what information, if any, reached them came from him as the author and manager of the scheme. Sage never uttered a word on the subject; Dodge does not appear even to have known that such an effort was in progress, and all that Gould ever said was that if six millions was subscribed abroad he would add as much more to the enterprise. No one of the three said at any time, or to any person, or for any purpose, that the foreign money had been in fact secured. How much Gould may have known about the progress of the negotiations abroad, how much he may have been desirous of their success, or to what extent he may have aided in them are matters open to discussion; but he never stated their result truthfully or untruthfully to anybody, or authorized, directed or encouraged any such statement by Work. That fact was the one upon which the success or failure of the enterprise depended, and which must have been the chief reliance of the bank, but the falsehood, if it was uttered, came solely from Work and no one else.

"Nor did either of the three defendants in any manner assert the solvency of the Southwest Construction Company, or authorize anybody to so assert it, or contemplate the making of such a statement. That company was organized by Work as an Iowa corporation. He manned it with his own clerks, relatives and friends. Prior to its organization the utility of forming such a company was admitted by Gould, at whose suggestion his son was named as president. Gould and Sage undoubtedly encouraged its creation, and meant, if the capital sought could be obtained, to use it as the agency of construction, but until then they had no responsibility for it, no control of it and no interest in it. Gould and Sage touched it only once and at a single point. Sampsell sent them a proposition to make a contract with the Southwest Co. for construction. They had not asked him to do so, or said a word to induce him to such action. They had a right to believe that he had investigated for himself the character of

the company with which he was seeking to contract, and was willing to take whatever of risk was inseparable from his conclusion. All they were asked to do was to influence the company and not Sampsell. He had determined, but the former had not. Gould and Sage thereupon recommended to the company an acceptance of the proposition. Their statement was to the company and to that only, and was advice intended solely for those to whom it was directed. It in no manner represented or asserted the solvency of the company. It was not asked for that purpose, or given with that intention, or contemplated to be used or to operate beyond its terms. It said in substance that since Sampsell desired to contract with the company the subscribers were content to have the company contract with him; they said that, not as members of the corporation, but as persons likely in the future to become such members; and said it for the company to act upon it in the only usual and corporate manner and with all needed terms and conditions. There was about it no representation of any fact bearing upon the responsibility of the company, and it is obvious that it was not contemplated or intended to influence any one except the company to which it was directed. Its aim and its office went no further and ended there.

"But even this recommendation was not followed, and what was done became an utter departure from the advice tendered. No contract was in fact made. The plaintiff so argues. The company never acted, but Work, in the presence and with the knowledge of Sampsell, signed George Gould's name as president to a temporary and invalid agreement, and Sampsell took it to the bank and presented it as honest and valid. With the fraud of Sampsell neither Gould nor Sage had any connection, and were not even cognizant of it at the time. Fraud and deceit are to be proved, and there is no evidence here of any word or act on the part of Gould and Sage which made them responsible for the after and unknown and undirected action of Work and Sampsell.

"The case is equally barren of proof as against Dodge. The only statement ever made by him was not one of fact, but of opinion respecting the future, which he honestly believed to be correct and was entirely excusable for so believing. He

did say to Sampsell that the parties interested in the old roads would build the new, and with the facts known to everybody about the recent concession, the opinion expressed was natural and reasonable. But he represented no fact of any kind, and his dealing with both Sampsell and Wathen, the engineer, is open only to the criticism that he fully believed that an event would occur in the future as to which he was too sanguine and hopeful. He deceived nobody and misled nobody by any assertion of fact which was untrue. He never said that the money was obtained for the enterprise, or that the new company was solvent, or professed to have any knowledge of either fact. He had frankly stated his intention to get out of Mexico and discontinue his connection with operations there, and said quite enough to prevent a supposition that he represented anybody engaged in the further enterprise, or had information not common to all. His friendship for the engineer and for the contractors with whom he had previously been associated, and to some extent his own indirect interest, led him to assist each in an effort to retain their places under the changed conditions which he fully believed were about to occur, and he did so with somewhat more of confidence in the outlook than actual results justified, but he told no falsehood, misrepresented no fact, believed in the opinion which he expressed, and was not guilty in any direction of deceit or fraud.

"I have not sought to follow the arguments made through their numerous details, or to refer to a great number of minor facts which appear in the record. But there is one among them which deserves some further attention, and which is the necessity, obvious to all the parties, of an immediate resumption of work on the line in order to save the concession. The inference deduced is that when Sampsell's proposition was brought to Gould, it showed on its face a purpose to begin work before the concession expired, that Gould knew of that purpose, and knowing also that the whole enterprise was yet in doubt and not assured, should have warned Sampsell of his danger and told him the truth. But Gould did not know that Sampsell was being at all misled. There is no indication that the former suspected Work of having deceived the contractor, or of having stated to him anything but the truth. Gould

was at liberty to believe that Sampsell, after due investigation, was willing to trust the Southwest Co., and prepared in view of the possible profits to take whatever of risk was involved in his proposition. Very likely, at the moment, and in view of the existing indications, Gould himself thought that risk was slight, and the action of the contractor no more imprudent than occurs daily among careful men in taking business risks; but in any event Gould was not called upon to advise Sampsell, or to suspect that the latter was being misled or acting under a mistake as to the facts. Gould had not, either directly or indirectly, induced the proposition, or encouraged Sampsell to make it, or been called upon for advice on the subject; and was under no obligation to seek him out and warn him against the possible risks of his offer.

"But I should not unduly prolong the discussion. I have read the case carefully, and am quite satisfied that the question involved was correctly determined.

"The judgment should be affirmed, with costs."

M. I. Southard and *Thomas Ewing* for appellant.

Almon Goodwin and *Jno. F. Dillon* for respondents.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed. _____

EUGENE SMITH, as Executor, etc., Appellant, v. FREDERICKA
RENTZ, Respondent.

(Argued February 26, 1894; decided March 13, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 8, 1893, which denied a motion by plaintiff to modify a judgment entered upon an order reversing an order granting a new trial.

H. B. Closson for appellant.

Leopold Leo for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JACOB HEINTZ, Respondent, *v.* JAMES EVERARD, Appellant.

(Argued February 27, 1894; decided March 13, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made November 14, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

David M. Newberger for appellant.

George P. Hoteling for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

HELEN S. SAYLES, Appellant, *v.* THE NATIONAL WATER PURIFYING COMPANY, Respondent.

(Argued February 28, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the fourth Tuesday of November, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

E. F. Bullard for appellant.

W. B. Dunlap for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY F. CRONE, an Infant, by Guardian, etc., Respondent, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

(Argued March 1, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made October 26, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict.

James Fraser Gluck for appellant.

Myron H. Clark for respondent.

Agree to affirm; no opinion.

All concur, except FINCH, J., taking no part.

Judgment affirmed.

JOHN BAKER, Appellant, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued March 1, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 20, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

J. Newton Fiero for appellant.

Hamilton Harris for respondent.

Agree to affirm; no opinion.

All concur, except FINCH, J., taking no part.

Judgment affirmed.

WILLIAM O. ALLISON, Appellant, v. HARVEY N. LOOMIS et al.,
Impleaded, etc., Respondents.

(Argued March 1, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in fourth judicial department, entered upon an order

made September 13, 1892, which affirmed a judgment in favor of defendants entered upon the report of a referee.

Theron G. Strong for appellant.

Louis Marshall for respondents.

Agree to affirm on opinion of General Term on first appeal.*

All concur.

Judgment affirmed. _____

JOSE F. J. XIQUES, Appellant, *v.* THE BRADSTREET COMPANY,
Respondent.

(Argued March 5, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made August 30, 1893, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

Hector M. Hitchings for appellant.

John H. Bird for respondent.

Agree to affirm on opinion below.†

All concur.

Judgment affirmed. _____

T. THOMAS FORTUNE, Respondent, *v.* JAMES TRAINOR,
Appellant.

(Argued March 5, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 29, 1892, which affirmed a judgment in favor of

*29 N. Y. S. R. 617; 9 N. Y. Supp. 83; *Mem. of decision*, 55 Hun, 612.

†70 Hun, 834.

plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Julius Lehmann for appellant.

T. McCants Stewart for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

MORRIS S. MILLER, Respondent, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 5, 1894 ; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. D. Prescott for appellant.

D. F. Searle for respondent.

Agree to affirm ; no opinion.

All concur, except FINCH, J., not voting.

Judgment affirmed. _____

THE HOWE'S CAVE ASSOCIATION, Appellant, *v.* PETER HOUCK,
Respondent.

(Argued March 5, 1894 ; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit without a jury.

William C. Lamont for appellant.

G. M. Palmer for respondent.

Agree to affirm on opinion below.*

All concur, except EARL, J., not voting.

Judgment affirmed.

CHARLES H. SOUTHARD, Appellant, v. MARIA Moss, Impleaded,
etc., Respondent.

(Argued March 6, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made December 5, 1892, which reversed a judgment entered upon a decision of the court on trial at Special Term overruling a demurrer interposed to the complaint, and which sustained such demurrer.

Horace Secor, Jr., for appellant.

Hamilton R. Squier for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES H. SOUTHARD, Respondent, v. FREDERICK S. MYERS,
Impleaded, etc., Appellant.

(Argued March 6, 1894; decided March 20, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 3, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

* *Hamilton R. Squier* for appellant.

Horace Secor, Jr., for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.



INDEX.

ACCOUNTING.

The complaint herein alleged that the parties were associated in business under an agreement "in the nature of a general partnership or quasi partnership," by the terms of which plaintiff was entitled to draw a sum specified weekly, and was also to have a specified percentage of the net profits. The relief asked was an accounting and judgment for the amount found due. The answer alleged that the relation of the parties was that of employer and employee, plaintiff being entitled for his services to a weekly sum and a share of the profits, but a less percentage than that claimed in the complaint. Upon application for a reference it appeared that the accounting would require the examination of many transactions and items and that no difficult question of law was involved. *Held*, that in either view of the relation of the parties an order of reference was proper. *Roxland v. Roxland*. 485

— As to sufficiency of evidence to sustain decision of Surrogate's Court on settlement of executor's account. See *In re Bolton* (Mem.). 554

ACTS OF CONGRESS.

The provision of the U. S. Revised Statutes (§ 5344) which declares that every person employed on any steamboat or vessel "by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed * * * shall be deemed guilty of manslaughter," and which provides a punishment therefor, "upon conviction thereof in any Circuit Court of the United States," does not exclude the courts of the state from jurisdiction over such an offense committed upon

the Hudson river; there is no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide; and the provision of said statutes (§ 5328) declaring that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof," is to be construed as exempting from the operation of the provision (§ 711) declaring that the jurisdiction of the federal courts shall be exclusive over "all crimes and offenses cognizable under the laws of the United States," the cases specified in the title which were punishable under the laws of the several states, at least such as were so punishable under state laws existing when the provision last mentioned was enacted. *People v. Welch*. 266

ADMISSIONS AND DECLARATIONS.

1. Declarations of a deceased person, made when he was in possession of real estate, in reference to his title thereto, which were against his interest, may be given in evidence even in an action between third parties where the title comes in question. *Lyon v. Ricker*. 225
2. Where, therefore, in an action of ejectment plaintiffs claimed title under deeds given under a judgment in a partition suit, to which defendants were not parties and had no connection therewith, *held*, that admissions to the effect that plaintiffs owned the land, made by one from whom defendants took a deed, when neither he nor plaintiffs were in possession, did not bind the defendants who subsequently took possession claiming to be the owners, and who relied upon their possession as sufficient evidence of ownership as against

plaintiffs. *Greenleaf v. B., F. & C. I. R. Co.* 395

3. The silence of one to whom a letter is written, when there is no duty to speak, does not operate as an admission of the facts stated in the letter. *Thomas v. Gage.* 506

ALBANY (CITY OF).

1. Under the provision of the charter of the city of Albany (§ 11, tit. 13, chap. 298, Laws of 1883), as amended in 1888 (Chap. 398, Laws of 1888), requiring the city engineer, where a building projects into the street, "upon the receipt of written directions from the mayor," to take summary proceedings for the removal thereof, a discretion is given to the mayor to determine in any given case whether or not such proceedings shall be instituted. *People ex rel. v. Maher.* 380
2. Accordingly *held*, that the court had no power to compel the mayor by mandamus to initiate such proceedings by giving the prescribed notice to the engineer; and that the discretion of the mayor in this respect was not affected by a resolution of the common council requesting him to take proceedings for the removal of the obstruction. *Id.*
3. *It seems*, the common council, as commissioners of highways, might institute proceedings appertaining to their functions as such, for the removal of the obstruction. *Id.*

ALIENATION.

See SUSPENSION OF POWER OF ALIENATION.

AMENDMENT.

In an action against executors to recover the value of services alleged to have been rendered the deceased, defendants, under a plea of payment, were permitted to prove an agreement between plaintiff and the testator that certain devises and bequests to the

former in the will of the latter should be in full payment and discharge of any claim for such services, save in case the will failed to be admitted to probate; and that as the agreement had been performed by decedent, and the provision made for him in the will accepted by plaintiff. The referee, on application of defendants' counsel, permitted the answer to be amended by alleging the agreement. *Held*, no error; that while the amendment was unnecessary and the evidence proper under the plea of payment, the referee had power to allow it. (Code Civ. Pro. §§ 721, 722, 723.) *McLaughlin v. Webster.* 76

APPEAL.

1. Where one claiming under an assignment of his commissions, executed by an executor before settlement of his accounts, appealed from an order of the General Term affirming an order of the surrogate denying a motion made by said assignee to open and modify his decree, made on settlement of the accounts of the executors, which decree refused commissions to the assignee, *held*, that the appellant had no interest authorizing him to make the motion or bring the appeal. *In re Worthington.* 9
2. Plaintiffs obtained an attachment against a corporation, which was placed in the hands of defendant, as sheriff, who, by virtue thereof, levied upon certain property of the corporation. A. claimed the property, and pursuant to an agreement between him, a clerk of one of defendant's deputies and plaintiff's attorney, A. gave a check as security for any judgment plaintiffs might recover, and thereupon the property was delivered up to him, and defendant drew the money on the check. A. commenced an action to recover the same, claiming that the property belonged to him and that the check simply took its place; he recovered judgment, which was paid by defendant. Plaintiffs were not made parties; they obtained judgment in the attachment suit, and having failed

- to collect, brought this action to recover the amount of the judgment. Defendant claimed, on appeal, that he was not liable for the contract made by the deputy's clerk; the authority was not denied, but was assumed on the trial. *Held*, that the question could not be raised on appeal. *Blair v. Black*. 58
3. Defendant further claimed, on appeal, that he was bailee of the check and its proceeds, and that he should have been permitted to show on the trial that the true owner had taken it from him by legal process. No such defense was set up in the answer or alluded to on the trial. *Held*, not available on appeal. *Id.*
4. Where a question put to a witness calls only for proper testimony, but in the course of the answer the witness gives testimony that is improper, the remedy of the party is by motion to strike out the improper testimony, and if he omits, upon the trial, to insist upon his right to have such testimony excluded, its reception is not a ground for reversal; on appeal, an exception to the question is not sufficient. *Holmes v. Roper*. 64
5. This court may not review even a void order in an action when it does not affect a substantial right. *De Lancey v. Piepgans*. 88
6. After judgment in an action of ejectment an order was granted under the Code of Civil Procedure (§ 1525), setting aside the judgment and granting a new trial. Subsequently, on motion of defendant, an order was granted setting aside said prior order, amending and modifying the judgment and execution, with leave to apply again for leave to vacate the amended judgment for the purposes of a new trial, but refusing to set aside the execution, under which plaintiff had been put in possession. On appeal from the order, *held*, that it was one addressed to the discretion of the court below and so was not reviewable here. (Code Civ. Pro. § 190.) *Id.*
7. An order denying a temporary injunction in an action wherein there are no controverted facts and the complaint presents simply a question of law, is reviewable here. *White v. Inebriates' Home*. 123
8. In an action for the conversion of certain machinery which had been used by plaintiff for several years before the alleged conversion, plaintiff was permitted to prove, under objection and exception, what the machinery cost when new. Counsel for defendants requested the court to charge that the purchase price was not the true rule of damages or the value of the property; to this the court assented, adding "it is only some evidence as to its value as a new and perfect machine. No motion was made for a nonsuit, or exception taken presenting the question that there was no sufficient evidence of value to sustain a verdict. *Held*, that the question could not be raised upon appeal. *Hawver v. Bell*. 140
9. In an action to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interests of her co-tenants, who also assigned to her their rights of action and claims for damages. The trial judge found that prior to the commencement of the action all the parties who were co-tenants with plaintiff duly assigned to her, for a valuable consideration, all their rights of action by reason of the diminution in value of the premises or the rental value by reason of the construction and maintenance of the road. To this finding the defendants excepted, "and separately to so much thereof as finds that the plaintiff ever took from her co-tenants an assignment for valuable consideration of any rights of action as therein stated." Upon appeal it was claimed by defendants that there was no evidence of assign-

- ment by certain of the former tenants in common. *Held*, that the point was not presented by the exception and so could not be considered. *Hunter v. Manhattan R. Co.* 281
10. A judgment will not be reversed for a technical error which it appears did not affect the result. *In re Bernsee.* 389
11. While it is one of the pre-requisites to the specific performance of an alleged parol agreement for the purchase and sale of land that the agreement shall be clearly proved and certain as to its terms, this rule is to be observed and enforced in the courts below which deal with the facts, and when such an agreement has been there found upon conflicting evidence, and is certain in its terms as found, it must be taken as clearly established within the rule, and the findings are conclusive here. *Dunckel v. Dunckel.* 427
12. The granting of relief by way of specific performance of such a contract is largely in the discretion of an equity court, and where it is granted without violating any fixed rule of equity, the discretion is not reviewable here. *Id.*
13. Where, on trial at Circuit, a verdict is directed by the court, and exceptions are ordered to be heard in the first instance at General Term, an appeal from the judgment brings up nothing for review except questions presented by the exceptions, and so, where the direction of the verdict is not excepted to, the question as to its propriety may not be considered on the appeal. *Curtis v. W. & W. Mfg. Co.* 511
14. Where in proceedings under the General Railroad Act (Chap. 140, Laws of 1850, as amended) to condemn lands for railroad purposes, an award of commissioners is reversed and a new appraisal directed, and upon a second hearing a new award is made, the second report "is final and conclusive on all the parties interested (§ 18 of said act, as amended by chap. 198, Laws of 1876), and no appeal lies to this court from an order of General Term affirming an order of Special Term confirming the second report. *In re S. B. R. R. Co.* 532
15. The jurisdiction of this court on appeal from a judgment of General Term affirming a surrogate's decree on settlement of the accounts of executors is limited to questions of law presented by proper exceptions. *In re Bolton.* 534
16. Where an order of General Term affirming an order of Special Term which denied a motion for a bill of particulars, does not state the ground for the denial, it will be assumed that it was in the exercise of the discretion of that court, and so, the order may not be reviewed here. *Cohn v. Baldwin.* 563
17. The opinion of the General Term may not be looked to to ascertain the ground. *Id.*
 — *When point not raised on trial may not be considered on appeal.*
See Quinlan v. Welch. 158
 — *This court on appeal from order of General Term affirming decree of surrogate refusing probate, has no power to review prior General Term order, reversing surrogate's decree admitting the will to probate.*
See In re Bartholick. 166
 — *As to effect of stipulation for judgment absolute in case of affirmance on appeal from order granting a new trial.*
See Rose v. Hawley. 366
- ### ASSESSMENT AND TAXATION.
1. Foreign corporations are included within the terms of the act of 1855 (Chap. 37, Laws of 1855) subjecting non-residents doing business in this state to assessment and taxation on all sums invested in such business. *People ex rel. v. Barker.* 118
2. A person or corporation liable to assessment and taxation under the

- act is not entitled to a deduction of debts. *Id.*
3. In the assessment of taxes upon a corporation under the act of 1857 (§ 3, chap. 456, Laws of 1857), it is entitled to have its indebtedness deducted from the value of its corporate assets. *People ex rel. v. Barker.* 196
4. Where, in proceedings by certiorari to review the action of the commissioners of taxes and assessments of the city of New York, in assessing a manufacturing corporation, it appeared that the assessment was based solely upon statements of the relator in answer to questions put by the commissioners, which statements showed that the capital was impaired and that the indebtedness of the company exceeded the value of its assets exclusive of real estate, and did not disclose any fact or circumstance justifying a disbelief of the answers made, except that a dividend had been declared and paid shortly previous, *held*, that this did not authorize a disbelief in the statement of the impairment of capital, and, in the absence of any request on the part of the commissioners for further information, did not justify them in imposing a tax, as the statements, if accepted as true, showed that there was no basis therefor. *People ex rel. v. Barker.* 251
5. As under the provisions of the act of 1873, in relation to the collection of taxes in the county of Suffolk (Chap. 620, Laws of 1873), the county treasurer's deed on sale of land for unpaid taxes is made conclusive evidence that the sale was regular, and presumptive evidence of the regularity of all prior proceedings, where such proceedings are, in fact, void, an action to cancel the deed, as a cloud on title, is maintainable. *Sanders v. Doens.* 422
6. It is essential to the validity of every assessment for the purposes of taxation that the statute under the authority of which it is made, should be complied with in every substantial particular. *Id.*
7. In assessing unoccupied lands in said county belonging to plaintiff, who was a non-resident of the county, the name of plaintiff was inserted in the first column of the assessment roll, under the head of non-residents, and his place of residence was written under the name in that column. In all other respects the provisions of the statute in respect to the assessment of non-resident lands were complied with. (1 R. S. 390, §§ 9, *et seq.*) In the warrant attached to the roll the collector was commanded to collect from the persons whose names are inserted in the first column, "other than such persons as are named as a part of the description of the lands of non-residents." In an action to compel the cancellation of a deed given on sale of said lands for non-payment of the taxes, *held*, that the assessment was made in such form as, at least, to leave it open to doubt whether plaintiff's name was so entered as a part of the description of the lands, or for the purpose of including him among the taxable inhabitants; that there was not a substantial compliance with the statute, and so that plaintiff was entitled to the relief sought. *Id.*
8. Under the provisions of the Corporation Tax Act (Chap. 542, Laws of 1880), added by the amendment of 1889 (Chap. 463, Laws of 1889), giving to the state comptroller power to revise and adjust any account theretofore settled against a corporation for taxes arising under the act, and authorizing a review by certiorari of the action of the comptroller, relief may be given as provided where a tax has been imposed upon and paid by a corporation which was exempt from any taxation under the act. *People ex rel. v. Wemple.* 471
9. The fact that the payment was not made under coercion does not deprive the corporation of the relief so granted. *Id.*
10. Where a corporation made a report to the comptroller stating facts from which the amount of the illegal tax was ascertained and

imposed, *held*, that this did not amount to a stipulation by virtue of which such tax was paid within the meaning of the section (§ 2) exempting such a case from the application of said provisions. *Id.*

11. Under the provision of the Collateral Inheritance Act of 1892 (§ 1, chap. 399, Laws of 1892) which imposes a tax upon the transfer, "by will or intestate law," of any property of the value of \$500, "to persons or corporations not exempt by law from taxation," a bequest to the United States is subject to the tax so imposed. *In re Merriam.* 479

12. The tax is not imposed upon the property, but on the right of succession under the will, and the property that vests under it in the United States is the net amount of the bequest after the succession tax is paid. *Id.*

13. Stocks of foreign corporations, held by an executor as such, are to be regarded as part of the estate, and so the right of succession thereto is subject to payment of the tax imposed by said act. *Id.*

ASSIGNMENT.

1. The commissions of an executor, until ascertained and liquidated in the manner prescribed by law, are not subject to his disposal, but upon grounds of public policy are unassignable. *In re Worthington.* 9

2. M. procured a policy of insurance for \$2,000 upon the life of his son, payable to himself, his executors or assigns; he died leaving a will by which he gave all of his estate to his executors in trust during the life of his widow, the principal then to be divided among his children. The son died in 1866 and the policy was collected by the executors of the father's will. In 1869 the children and devisees of said testator executed an instrument under seal, by which they assigned all their interest in the moneys collected on the policy to plain-

tiffs, the widow and children of the son. The widow died in June, 1891. In July thereafter defendant was appointed the administratrix with the will annexed of M. In an action to recover the amount of the policy, it appeared that defendant as such administratrix received of the personal estate over \$8,000, and that there were no debts. Plaintiffs' claim was presented to defendant and payment thereof refused. This action was brought in November, 1891. *Held*, that the delivery of the assignment constituted a valid irrevocable gift of the fund realized upon the policy and vested title in the donees, subject to the life interest in the widow; that plaintiffs' cause of action matured at her death, and so, was not barred by the Statute of Limitations; and that the action, if not necessary, was at least proper and was not prematurely brought. *Matson v. Abbey.* 179

ASSIGNMENT (EQUITABLE).

A contractor with the owner of land for the erection of a building thereon executed to C., who had furnished materials, an order upon the owner directing him to pay C. a sum specified, and deduct the same from the amount of the contract. In an action to recover the amount of the order, *held*, that the order amounted to an equitable assignment *pro tanto*; but that, in the absence of due prior notice to the owner of the assignment, he was only liable for the amount remaining unpaid on the contract when the action was brought. *Crouch v. Muller.* 495

ASYLUMS.

1. The provision of the act "to provide means for the support of the Inebriates' Home for Kings county" (§ 1, chap. 687, Laws of 1872), as amended in 1877 (§ 4, chap. 169, Laws of 1877), which directs the comptroller of the city of Brooklyn to pay to the treasurer of said home fifteen per cent of the excise moneys, was not repealed by the city charter of

1888 (Chap. 583, Laws of 1888).
White v. Inebriated Home. 128

2. Said act is not a "local and special" act relating to the corporation of the city within the meaning of the repealing clause in said charter. (§ 85, tit. 22.) *Id.*

3. The facts that said provision of the act of 1872 was amended in 1875 "so as to read as follows," and that in the amendatory act of 1877 the original provision was amended without reference to the amendment of 1875, do not render the last amendment nugatory; the original provision was not so merged and lost in the first amendment as to prevent a further amendment thereof by reference simply to the original. *Id.*

4. Said amendatory act of 1877 is not violative of the provision of the State Constitution (§ 11, art. 8) forbidding the giving by a city of its money or property in aid of persons or corporations, save as excepted; it comes within the exception allowing such gifts by a city "in aid or support of its poor as may be authorized by law." *Id.*

ATTACHMENT.

1. Plaintiffs obtained an attachment against a corporation, which was placed in the hands of defendant, as sheriff, who by virtue thereof, levied upon certain property of the corporation. A. claimed the property, and pursuant to an agreement between him, a clerk of one of defendant's deputies and plaintiff's attorney A. gave a check as security for any judgment plaintiffs might recover, and thereupon the property was delivered up to him, and defendant drew the money on the check. A. commenced an action to recover the same, claiming that the property belonged to him and that the check simply took its place; he recovered judgment, which was paid by defendant. Plaintiffs were not made parties; they obtained judgment in the attachment suit, and having failed to collect, brought this action to recover the amount of the judg-

ment. Defendant claimed, on appeal, that he was not liable for the contract made by the deputy's clerk; the authority was not denied but was assumed on the trial. *Held*, that the question could not be raised on appeal. *Blair v. Flack.* 58

2. An attachment issued in an action against several upon a joint liability, may be executed by seizure of the joint property, although the summons is served on but one of the defendants within the time prescribed, and no service by publication is commenced within that time, or if commenced is not continued to completion. *Yerkes v. McFadden.* 196

3. Accordingly *held*, where an attachment was issued against the members of a firm as non-residents, under which the firm property was levied upon, and a service of summons by publication was commenced, but was not completed, in one of the designated newspapers within the thirty days, but personal service was made on one of the defendants, that the lien of the attachment was not lost by the failure to complete the service by publication, nor could the attachment be vacated as against any of the defendants. *Id.*

ATTORNEY AND CLIENT.

1. *It seems* that in the case of an attorney who has collected money for a client, the Statute of Limitations begins to run against the latter's cause of action from the time he has knowledge of the collection. *Wood v. Young.* 211

2. An attorney employed to foreclose a mortgage has no implied authority to compromise the rights of his client and make nugatory the duty he was employed to perform. *Lewis v. Duane.* 302

ATTORNEY-GENERAL.

1. The attorney-general cannot maintain an action in the name of the People against a corporation,

either under the Code of Civil Procedure (§ 1948) or as a matter of common law, to restrain the commission of a nuisance in a city street by a corporation, where local officials have authority to protect the street. *People v. Equity G. L. Co.* 232

2. The jurisdiction of a court of equity to abate an existing and prevent a threatened nuisance upon application of the attorney-general, is limited to those public nuisances which affect and endanger the public safety or convenience and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by other constituted authorities and public officers. *Id.*

3. Accordingly *held*, that an action brought by the attorney-general in the name of the People was not maintainable against an incorporated gas light company, a contractor with it and one of its officers, to restrain the laying of gas pipes in a street in the city of Brooklyn, which was based on the ground that the corporate power of the company had ceased because of failure on its part to commence its business within the period prescribed by law, and that the work would be an injury to the highway and a nuisance. *Id.*

BAILMENT.

When question as to whether a transaction is a sale or bailment is one of fact for a jury. *Crosby v. Prest., etc., D. & H. C. Co.* 589

BANKS AND BANKING.

1. P., defendant's testator, was a private banker in New York city; by circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Plaintiff employed P. to loan for him \$25,000, which the latter agreed to do gratuitously; he loaned the money, taking as collateral certain certificates of corporate stock, which had by

a forgery been raised so as to represent a larger number of shares than they were issued for, and in consequence a loss resulted. In an action to recover damages, *held*, that the fact that the services of P. were rendered gratuitously did not free him from the obligation to exercise such diligence as he had promised to those dealing with him, nor was he at liberty to withhold from his agency the exercise of the skill and knowledge he held himself out to possess, and so, if the loss resulted from failure to exercise ordinary skill and knowledge, he was liable. *Isham v. Post.* 100

2. Plaintiff proved the delivery to P. of the amount specified, to be loaned and returned on demand, and that the latter refused to return the same on proper demand. *Held*, that the burden was upon defendant of proving affirmatively that P. did his duty fully and faithfully and without negligence or misconduct, and so that the loss was without his fault. *Id.*
3. It appeared that the loan was made to a firm in good repute and standing at the time; that the original certificates were genuine and lawful, and had been issued six years previously to a member of the firm, who had executed the usual blank assignments enabling them to pass from hand to hand, and were attested by his firm. The loan was made by P.'s managing clerk, who had had an extensive experience in such transactions, and had handled many of the certificates of the company whose stock was taken as collateral. The clerk took the certificates without close or careful scrutiny. The trial court found that P. was negligent in making the loan upon the security of the certificates, on the ground that he took them without examination, without presenting them for verification at the office of issue or registry and without inquiry as to the solvency of the borrowing firm. *Held*, that the care P. was bound to exercise did not require him to make inquiries or present the certificates for verification, but as to the omission to give the

certificates a proper examination the finding could not be held error as matter of law. *Id.*

4. Defendant offered to show that P. lent \$50,000 of his own money, accepting as collateral similarly raised certificates; also that the certificates in question had been given and received on the street as collateral for loans, and deceived the skill of a great number of bankers and brokers who took and held them without suspicion. This testimony was objected to and excluded. *Held*, error, as the proof, if made, would have shown good faith on defendant's part and would have excused and justified the failure to discover the forgery. *Id.*

5. Upon a claim presented to the Board of Claims the following facts appeared: M., who was a county treasurer, had received the taxes collected from his county for state purposes, which he had neglected to pay over. The state comptroller made a demand for payment. M. was at the time cashier of the claimant, and as such had in his possession blank drafts addressed to the claimant's correspondent bank in New York, and as cashier had power to draw drafts on that bank for himself as well as for others, and upon the same terms. M. filled up one of these blank drafts with the amount due the state, making it payable to the order of the comptroller, signed his name thereto as cashier, and forwarded it to that officer as payment for such taxes. The comptroller received and indorsed it, and upon presentation it was paid by the New York bank; the obligation of M. and his county was thereby discharged and the proceeds applied to the uses of the state. When M. drew and signed said draft he paid no money to the claimant and had none on deposit with it to his credit; he made no entry thereof upon its books, and kept all knowledge of it concealed from the other officers of the bank; he was then hopelessly insolvent, and about a month thereafter absconded. The comptroller received the draft in good faith and without knowledge that it was

issued by M. wrongfully and without authority. *Held*, that the state was not liable to refund the money so received; that the act of M. was within the scope of his general powers and apparent authority, and there was nothing in the form of the draft charging the state or its officers with notice that he was using the funds of the claimant to pay his individual debt; on the contrary, that the comptroller when he received it had the right to regard it as the property of the cashier regularly in his possession and proper to be used by him in payment of the taxes. *Gonhen Nat. Bank v. State of New York.* 379

BILL OF PARTICULARS.

1. Where an order of General Term affirming an order of Special Term which denied a motion for a bill of particulars, does not state the ground for the denial, it will be assumed that it was in the exercise of the discretion of that court, and so, the order may not be reviewed here. *Cohn v. Baldwin.* 563
2. The opinion of the General Term may not be looked to to ascertain the ground. *Id.*

BOARD OF CLAIMS.

The state erected a new highway bridge over the Erie canal, which, being wider than the old one, rendered a widening of the approaches necessary. The approach at one end was not graded up to the bridge for some days, and thus a hole was left which was unsafe and dangerous, without proper guards. No guards or lights were furnished, and plaintiff, in crossing the bridge on a very dark night, stepped into the hole and was injured. Upon a claim presented to the Board of Claims it appeared that plaintiff was not aware of the dangerous condition of the approach. *Held*, that the facts showed negligence on the part of the state and justified a finding that there was no contributory negligence on the part of the claimant. *Chisholm v. State.* 246

BROKER.

1. Where a broker who had purchased stock for a customer on a margin, sold it without previous notice to the customer, and thereafter presented an account to the latter showing the sale and a resultant loss, and the latter, without objection as to the manner of sale, promised to pay the balance shown by the account to be due, *held*, that he thereby waived the right to notice, and recognized and ratified the sale made. *Gillett v. Whiting*. 71
2. A real estate broker, in order to recover compensation for service as such, must prove that he found a purchaser and produced him to his principal, who was ready and willing to purchase the real estate of the latter upon his terms. The principal is entitled to know the name of the proposed purchaser, and so long as there is an uncertainty in this regard the broker is not entitled to compensation. *Gerding v. Harkin*. 514
8. In an action by such a broker to recover commissions, the evidence presented on behalf of plaintiff was to the effect that he went to defendants with L., who was engaged in forming a syndicate to purchase the land; that L. offered, on behalf of the syndicate, to purchase at defendants' price, giving names of those he claimed to be the proposed purchasers, a portion of whom had consented to join the syndicate, but before the syndicate was fully formed, or the proposition to be paid by each fixed, defendants sold the land to other parties. *Held*, that plaintiff failed to show performance of his contract; and that a refusal to nonsuit was error. *Id.*

See STOCK BROKERS.

BROOKLYN (CITY OF).

1. The provision of the act "to provide means for the support of the Inebriates' Home for Kings county" (§ 1, chap. 687, Laws of 1872), as amended in 1877 (§ 4,

chap. 169, Laws of 1877), which directs the comptroller of the city of Brooklyn to pay to the treasurer of said home fifteen per cent of the excise moneys, was not repealed by the city charter of 1888 (Chap. 588, Laws of 1888). *White v. Inebriates' Home*. 123

2. Said act is not a "local and special" act relating to the corporation of the city, within the meaning of the repealing clause in said charter. (§ 35, tit. 22.) *Id.*
3. The facts that said provision of the act of 1872 as amended in 1875 "so as to read as follows," and that in the amendatory act of 1877 the original provision was amended without reference to the amendment of 1875, do not render the last amendment nugatory; the original provision was not so merged and lost in the first amendment as to prevent a further amendment thereof by reference simply to the original. *Id.*
4. Said amendatory act of 1877 is not violative of the provision of the State Constitution (§ 11, art. 8) forbidding the giving by a city of its money or property in aid of persons or corporations, save as excepted; it comes within the exception allowing such gifts by a city "in aid or support of its poor as may be authorized by law." *Id.*
5. In 1835 the commissioners appointed under the act of that year to lay out streets, etc., in the city of Brooklyn (Chap. 132, Laws of 1835) made and filed a map showing a street passing over lands owned by H. The street was never actually opened or regulated. In 1851 H. conveyed the adjoining lands by deed which contained a reservation of his title and interest in the land forming the street. In 1864 the department of assessment of the city made and filed a map including said lands in which the street appeared substantially as in the map of 1835, and since then no assessment has been made or tax levied upon the land of H. included in said street. In 1879 the executors of H. filed a map of his

lands, laid out in streets, blocks and lots, corresponding with the commissioners' map, with a notice, however, indorsed thereon to the effect that it was not intended to dedicate any of the lands lying within the lines of the streets to public use; afterwards said executors conveyed lots, bounding them upon said streets, and including the land within the street lines in front of the lots conveyed. In proceedings instituted by the municipal authorities to acquire title for street purposes to the lands within the lines of said street as so laid out, *held*, that H. and his executors, as between themselves and their grantees, devoted the lands to use as a street, and the latter acquired an easement therein for that purpose; that the executors were only entitled to an award for the value of the public easement, deducting therefrom the value of the private easement, and as the added burden was merely technical and nominal, they were only entitled to nominal damages. *In re Adams.* 297

6. Defendants, under and pursuant to a contract with the city of Brooklyn, laid a conduit on lands belonging to the city. The conduit line crossed a stream which supplied a pond on plaintiff's premises that furnished water power for his mill. In building the conduit across the stream the water was temporarily diverted. After the work was completed and the bed of the stream restored to its original state, the water passed by underground drainage through the earth into the channel or trench dug for the conduit, and so plaintiff's pond was substantially drained and his water power destroyed. In an action to recover damages, *held*, that defendants were liable for damages sustained by plaintiff caused by the interruption of the flow of the stream during the time they were engaged in constructing the conduit across it; but were not liable for the subsequent injury caused by the conduit; that for this the city, the owner of the land, that directed the construction of the conduit, was alone liable. *Cocert v. Cranford.* 521

BUILDING CONTRACT.

1. Where a building contract contains a condition requiring an architect's certificate of completion of the contract, before payment of the last installment, it is essential, in an action upon the contract to recover that installment, to allege in the complaint performance of that condition, or set forth facts excusing plaintiff from procuring the certificate. *Weeks v. O'Brien.* 199
2. In order to avail himself of the objection the defendant is not required to present it by demurrer or answer; he may raise it on the trial. (Code Civ. Pro. § 499.) *Id.*
3. By a building contract it was provided in the specifications as to plastering that "King's Windsor cement" should be used and that the work should be done under the direction of a superintendent of King & Co. In another specification it was directed that the cement should be mixed "with equal parts good, sharp and dry sand." It was also provided that in case any dispute should arise respecting the true construction of the specifications, the same should be decided by B., the architect, "whose decision shall be final and conclusive." Plaintiff took a sub-contract to do the plaster work. In an action to foreclose a mechanic's lien, it appeared that the mixture used was two parts sand to one of cement. Evidence was given by plaintiff to the effect that the variation from the specifications was by the direction of said superintendent. A letter written by the architect to plaintiff was also given in evidence, in which the writer, after stating that plaintiff was not doing the work according to contract, or following the instructions of the superintendent, required him to follow those instructions "to the letter." *Id.*, that the superintendent had no authority under the contract to change the proportions of the mixture as fixed by the specifications, nor did the letter give any such authority; and so, a finding that plaintiff failed to perform

- his contract was proper. *Fitzgerald v. Moran.* 419
- BURDEN OF PROOF.**
- *When burden upon a gratuitous mandatory to show that a loss was without fault on his part.*
See Isham v. Post. 100
- CASES REVERSED, DISTINGUISHED, ETC.**
- Bird v. Pickford* (71 Hun, 142), reversed. *Bird v. Pickford.* 18
- Smith v. Van Ostrand* (64 N. Y. 278), distinguished. *Matter of McDougall.* 27
- Flanagan v. Flanagan* (8 Abb. [N. C.] 418), distinguished. *Matter of McDougall.* 27
- In re Woods* (35 Hun, 60), distinguished. *Matter of McDougall.* 27
- Thomas v. Wulford* (1 N. Y. Supp. 610), distinguished. *Matter of McDougall.* 27
- Champion v. Williams* (36 N. Y. S. R. 706), distinguished. *Matter of McDougall.* 27
- In re Grant* (16 N. Y. Supp. 716), distinguished. *Matter of McDougall.* 27
- Isham v. Post* (71 Hun, 184), reversed. *Isham v. Post.* 100
- People v. Wilmerding* (136 N. Y. 363), distinguished. *White v. Inebriates Home.* 127
- Kain v. Larkin* (66 Hun, 209), reversed. *Kain v. Larkin.* 144
- In re Kellum* (50 N. Y. 298), distinguished. *Matter of Bartholick.* 173
- Moore v. Hanover Fire Ins. Co.* (71 Hun, 199), reversed. *Moore v. Hanover Fire Ins. Co.* 219
- Thompson v. St. N. Nat. Bank* (113 N. Y. 327), distinguished. *Smith v. Sarin.* 328
- Clark v. Davenport* (95 N. Y. 478), distinguished. *King v. Townsend.* 362
- Comstock v. Hier* (73 N. Y. 269), distinguished. *Goshen Nat. Bank v. State of New York.* 336
- Claffin v. F. & C. Bank* (25 N. Y. 293), distinguished. *Goshen Nat. Bank v. State of New York.* 338
- Minor v. Beveridge* (67 Hun, 1), reversed. *Minor v. Beveridge.* 399
- Gillett v. Whiting* (120 N. Y. 402), distinguished and limited. *Minor v. Beveridge.* 403
- Riley v. Riley* (64 Hun, 496), reversed. *Riley v. Riley.* 409
- Iusigi v. Rosenstein* (65 Hun, 590), reversed. *Iusigi v. Rosenstein.* 414
- Russell v. McCall* (68 Hun, 44), reversed. *Russell v. McCall.* 437
- Fowler v. Bowery Sav. Bank* (113 N. Y. 450), distinguished. *Russell v. McCall.* 449
- Terry v. Munger* (121 N. Y. 161), distinguished. *Russell v. McCall.* 449
- Hume v. Randall* (65 Hun, 437), reversed. *Hume v. Randall.* 499
- Cutting v. Cutting* (86 N. Y. 522), distinguished. *Hume v. Randall.* 505
- Crooke v. County of Kings* (97 N. Y. 421), distinguished. *Hume v. Randall.* 505
- Genet v. Hunt* (113 N. Y. 159), distinguished. *Hume v. Randall.* 505
- Purchase v. Matteson* (25 N. Y. 211), distinguished. *Curtis v. Wheeler & Wilson Man. Co.* 513
- Hewitt v. Newburger* (66 Hun, 230), reversed. *Hewitt v. Newburger.* 539

CAUSE OF ACTION.

One who does an act, lawful in itself, upon the land of another, under the authority of the owner, is not liable in damages to the proprietor of adjoining lands for consequential injuries remotely resulting from the act, not naturally to be anticipated and flowing from occult causes which could only be conjectured by men of science, or disclosed by actual experience. *Covert v. Cranford*. 521

See CIVIL DAMAGE ACT.
CLOUD ON TITLE.
CONTRACT.
CONVERSION.
EJECTMENT.
EQUITY.
INJUNCTION.

CERTIORARI.

Under the provisions of the Corporation Tax Act (Chap. 542, Laws of 1880), added by the amendment of 1889 (Chap. 463, Laws of 1889), giving to the state comptroller power to revise and adjust any account theretofore settled against a corporation for taxes arising under the act, and authorizing a review by certiorari of the action of the comptroller, relief may be given as provided where a tax has been imposed upon and paid by a corporation which was exempt from any taxation under the act, *People ex rel. v. Wemple*. 471

CIVIL DAMAGE ACT.

1. The Civil Damage Act of 1873 (Chap. 646, Laws of 1873) is not a penal statute, but simply creates a cause of action unknown to the common law. *Quinlan v. Welch*. 158
2. Said act was not repealed by the provision of the act of 1892, "in relation to excise" (§ 2, chap. 403, Laws of 1892), providing for the recovery of damages caused by the sale of intoxicating liquors in case previous notice has been given forbidding the sale. The said

provision and the one upon the same subject in the act of 1892, "to revise and consolidate the laws in relation to the sale of intoxicating liquors" (§ 40, chap. 401, Laws of 1892), are to be read as simply amendatory of the act of 1873, not as repealing it by implication. *Id.*

3. A cause of action, therefore, which accrued prior to said amendments was not affected thereby. *Id.*
4. In an action under said act of 1873 these facts appeared: Q., the father of plaintiff, who was a skilled workman and the sole support of his wife and family, and who lived in the village of P., on the afternoon of June 17, 1891, being in the village of O., visited its saloons, and among them one owned by defendant and rented by him to one whom he knew was selling intoxicating liquors therein on that day. Q. drank heavily, and in the evening boarded a train to return home; he was at that time much intoxicated; he left the train at a station before it reached P., and in attempting to walk on the railroad track to the latter place was killed; his mutilated body was found the next morning on the track, midway between that station and his home. *Held*, that the evidence was sufficient to submit to the jury as to all the essential facts required to be established to sustain the action; and so that a refusal to nonsuit was not error. *Id.*
5. The testimony showed that plaintiff was born on June eighteenth, at what hour it did not appear, nor did it appear whether Q. was killed on the morning of that day or on the previous evening. Defendant on appeal for the first time claimed that plaintiff was born after her father's death, and so, could not maintain the action. *Held*, untenable; that, conceding the point was presented by the proofs, as to which *quære*, it should have been raised on trial, and the attention of the trial court not having been called to it, it could not be considered on appeal. *Id.*

CLOUD ON TITLE.

1. Equity may interfere to prevent a threatened cloud on title where there appears to be a determination to create such a cloud, and the danger is not merely speculative or potential. *King v. Townshend*. 358

2. In an action to compel the cancellation of a lease, executed and delivered by the comptroller of the city of New York, upon a sale of land for unpaid taxes, it was conceded that the lease was void because the sale included an illegal charge for interest; but it was claimed by defendant, the lessee, that the lease constituted no cloud on plaintiff's title, as it was ineffective to give a right of possession or establish a title, because no notice to redeem had been given the occupant or owner, and a comptroller's certificate obtained, as required by the statute (§§ 13-16, chap. 881, Laws of 1871), before the lease could be recorded. *Held*, that while, until the certificate was given, no title passed by the lease, and so, it might not constitute an actual cloud, yet it was a decisive step towards it, and a threat and menace to create one in the future, and as the invalidity of the lease did not appear upon its face, the court had jurisdiction to grant the relief sought. *Id.*

3. Also *held*, that the fact the lessee had for many years omitted to give the notice was no answer, but, on the contrary, it only intensified the injury and danger. *Id.*

4. In the plaintiff's chain of title was a deed to three persons, who were described as trustees of a land association. It did not appear that the association was incorporated, or capable as such of taking a legal title. *Held*, it was to be assumed that the association was a partnership of individuals, of which the grantees were members, holding the legal title for the benefit of themselves and others, and so they were not mere trustees, holding simply a nominal title, and the provisions of the Revised Statutes (1 R. S. 728, §§ 49-58), taking away such a title and vesting it in the

beneficiary, did not apply; and, therefore, whether the deed was to be regarded as one to the grantees named individually, or as a conveyance for their benefit and that of others, they had authority to sell and convey a good title. *Id.*

5. At the time of the conveyance to plaintiff defendant T., the lessee, was in possession. He showed no title upon which his possession rested, except the lease. *Held*, that his possession thereunder was not adverse to plaintiff's title, and so did not affect the validity of his deed. *Id.*

6. In a prior action of ejectment brought by one then holding the record title against T., while he was in possession, a judgment was rendered in his favor. In that action the plaintiff proved no possession, either in himself or any of his grantees, and the defendant neither pleaded nor proved a title, but relied on his possession. *Held*, that the judgment was not conclusive against the title now held by plaintiff, as it did not establish a title in any one, and did not destroy or affect a title subsequently made perfect by possession. *Id.*

7. As under the provisions of the act of 1873, in relation to the collection of taxes in the county of Suffolk (Chap. 620, Laws of 1873), the county treasurer's deed on sale of land for unpaid taxes is made conclusive evidence that the sale was regular, and presumptive evidence of the regularity of all prior proceedings, where such proceedings are, in fact, void, an action to cancel the deed, as a cloud on title, is maintainable. *Sanders v. Downs*. 422

CODES.

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.
PENAL CODE.

CODE OF CIVIL PROCEDURE.

190.	<i>De Lancey v. Piepgras</i> .	88
399.	<i>Riley v. Riley</i> .	409
403.		
499.	<i>Weeks v. O'Brien</i> .	199

721.	{	<i>McLaughlin v. Webster.</i>	76
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3843.	{	<i>Matson v. Abbey.</i>	179
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	{	<i>People v. Equity G. L. Co.</i>	232
	{	<i>In re Bartholick.</i>	166
	{	<i>In re Merriam.</i>	479

CODE OF CRIMINAL PROCEDURE.

84.	{	<i>Hewitt v. Neuburger.</i>	538
177.			
sub. 8.			
	{	<i>People v. Wilson.</i>	185

COLLISION.

Where defendant was convicted in a state court of the crime of manslaughter in the second degree upon evidence showing that, while acting as a duly licensed pilot in charge of a steam tug on the Hudson river, through his "willful misconduct, negligence and inattention to his duties," the tug collided with a yacht, causing the death of a person on board the yacht, *held*, that the state court had jurisdiction to punish defendant for the crime. *People v. Welch.* 266

COMMON SCHOOLS.

1. A school commissioner is a constitutional officer "elected by the People," and so, under the State Constitution prescribing the qualification of voters (Art. 2, § 1), may only be voted for by "male citizens." *In re Gage.* 112
2. Accordingly *held*, that the act of 1892 (Chap. 214, Laws of 1892), conferring upon women the right to vote for school commissioners, is unconstitutional. *Id.*

COMPTROLLER.

1. Upon a claim presented to the Board of Claims the following

facts appeared: M., who was a county treasurer, had received the taxes collected from his county for state purposes, which he had neglected to pay over. The state comptroller made a demand for payment. M. was at the time cashier of the claimant, and as such had in his possession blank drafts addressed to the claimant's correspondent bank in New York, and as cashier had power to draw drafts on that bank for himself as well as for others, and upon the same terms. M. filled up one of these blank drafts with the amount due the state, making it payable to the order of the comptroller, signed his name thereto as cashier, and forwarded it to that officer as payment for such taxes. The comptroller received and indorsed it; and upon presentation it was paid by the New York bank; the obligation of M. and his county was thereby discharged and the proceeds applied to the uses of the state. When M. drew and signed said draft he paid no money to the claimant and had none on deposit with it to his credit; he made no entry thereof upon its books, and kept all knowledge of it concealed from the other officers of the bank; he was then hopelessly insolvent, and about a month thereafter absconded. The comptroller received the draft in good faith and without knowledge that it was issued by M. wrongfully and without authority. *Held*, that the state was not liable to refund the money so received; that the act of M. was within the scope of his general powers and apparent authority, and there was nothing in the form of the draft charging the state or its officers with notice that he was using the funds of the claimant to pay his individual debt; on the contrary, that the comptroller when he received it had the right to regard it as the property of the cashier regularly in his possession and proper to be used by him in payment of the taxes. *Goshen Nat. Bank v. State.* 379

2. Under the provisions of the Corporation Tax Act (Chap. 542, Laws of 1890), added by the

amendment of 1889 (Chap. 463, Laws of 1889), giving to the state comptroller power to revise and adjust any account theretofore settled against a corporation for taxes arising under the act, and authorizing a review by certiorari of the action of the comptroller, relief may be given as provided where a tax has been imposed upon and paid by a corporation which was exempt from any taxation under the act. *People ex rel. v. Wemple.* 471

CONDITIONS.

Where a grantor of land seeks to re-enter because of a breach of a condition subsequent, he must show that the true spirit and purpose of the condition have been willfully disregarded by the grantee; it is not sufficient to prove a technical breach, through the action of strangers, without the grantee's permission. *Rose v. Hawley.* 366

CONFLICT OF LAWS.

1. In determining as to the validity of a foreign will, disposing of personalty, it is immaterial whether the testator was a citizen of the country where the will was executed or of this state; if the former was his domicile at the time of his death its laws will control. *Dannert v. Osborn.* 564
2. The courts of this state may not annul a disposition of personal property in a foreign will, valid by the law of the testator's domicile, and distribute the property to claimants here, contrary to the terms of such disposition. *Id.*
3. *It seems*, when our courts cannot give effect to such a testamentary disposition without violating our laws or public policy, the property should be remitted to the jurisdiction of the domicile. *Id.*

CONGRESS.

1. As to crimes committed upon navigable waters within the state,

if they are such as existed at common law, and are defined in the statutes of the state, while congress may exclude the jurisdiction of the state courts, in the absence of any such exclusion, that jurisdiction may be exercised, although congress has vested jurisdiction over them in the federal courts. *People v. Welch.* 266

2. To exclude the jurisdiction of the state courts over such crimes, the intention of congress so to do must be distinctly manifested, and the legislation relied upon for that purpose must be clear and unambiguous. No presumption that state authority is excluded arises from the mere fact that congress has legislated; there must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject. *Id.*

CONSTITUTION.

1. The courts of the state have civil and criminal jurisdiction over the navigable waters within its limits, and, in the absence of any prohibition in the Federal Constitution or laws, persons and property thereon are subject to such jurisdiction. *People v. Welch.* 266
2. The powers granted by the Federal Constitution are not exclusive unless they are made so in terms, or prohibited to the states, or are incompatible with the exercise of a concurrent jurisdiction. *Id.*
3. As to crimes committed upon navigable waters within the state, if they are such as existed at common law, and are defined in the statutes of the state, while congress may exclude the jurisdiction of the state courts, in the absence of any such exclusion, that jurisdiction may be exercised, although congress has vested jurisdiction over them in the federal courts. *Id.*

CONSTITUTIONAL LAW.

1. A school commissioner is a constitutional officer "elected by the People," and so, under the State

- Constitution prescribing the qualification of voters (Art. 2, § 1), may only be voted for by "male citizens." *In re Gage*. 112
2. Accordingly *held*, that the act of 1892 (Chap. 214, Laws of 1892), conferring upon women the right to vote for school commissioners, is unconstitutional. *Id.*
 3. The provision of the act "to provide means for the support of the Inebriates' Home for Kings county" (§ 1, chap. 687, Laws of 1872), as amended in 1877 (§ 4, chap. 169, Laws of 1877), which directs the comptroller of the city of Brooklyn to pay to the treasurer of said home fifteen per cent of the excise moneys, is not violative of the provision of the State Constitution (§ 11, art. 8) forbidding the giving by a city of its money or property in aid of persons or corporations, save as excepted; it comes within the exception allowing such gifts by a city "in aid or support of its poor as may be authorized by law." *White v. Inebriates' Home*. 128
 4. The provision of the Penal Code (§ 292) declaring a person guilty of a misdemeanor who exhibits a female child under sixteen years of age, or who, having the care of such a child as parent, etc., consents to her employment or exhibition as "a dancer * * * or in a theatrical exhibition, or in any * * * exhibition dangerous or injurious to the life, limb, health or morals of the child," is not violative of any right secured by the Constitution, but is within the police power of the legislature; it is for that body to determine as to whether any or all such exhibitions are prejudicial to the interests of the child and contrary to the policy of the state to permit. *People v. Eicer*. 129
 5. Under the provisions of the act for the preservation of fish and game (§§ 238, 240, chap. 488, Laws of 1892), as amended in 1893 (Chap. 573, Laws of 1893), fines as well as penalties for violations of the act are required to be paid over to the board of commissioners of fisheries, not to the county treasurer. The amendment has a retroactive effect, and as such is constitutional. The moneys collected are in no sense the private property of the county, and hence it is not deprived of private property by the amendment. *People ex rel. v. Crennan*. 239
 6. A statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, after conviction, is not violative of the provision of the State Constitution (§ 5, art. 4) giving to the governor the power to grant reprieves and pardons. *People ex rel. v. Court of Sessions*. 288
 7. The distinction between the two powers pointed out. *Id.*
 8. *It seems*, however, the legislature cannot authorize such courts to so limit the exercise of their discretion to inflict punishment when deemed proper, in a case where sentence has been suspended, as to make such exercise dependent upon compliance on the part of the person convicted with some condition that will require the court to try a question of fact before it can impose the punishment. *Id.*
 9. The provision of the Penal Code (§ 12) as amended in 1893 (Chap. 379, Laws of 1893), which declares that a criminal court, in certain cases, "may, in its discretion, suspend sentence during the good behavior of the person convicted," does not express such a condition, and does not preclude the court from passing the proper sentence whenever it appears to it to be proper. *Id.*
- CONTRACT.
1. An executory promise to pay a sum of money, made without consideration, and intended to operate as a gift after the death of the promisor, is invalid and cannot be enforced. *Holmes v. Roper*. 64
 2. Where a building contract contains a condition requiring an architect's certificate of completion of the contract, before pay-

ment of the last installment, it is essential, in an action upon the contract to recover that installment, to allege in the complaint performance of that condition, or set forth facts excusing plaintiff from procuring the certificate.
Weeks v. O'Brien. 199

3. In order to avail himself of the objection the defendant is not required to present it by demurrer or answer; he may raise it on the trial. (Code Civ. Pro. § 499.) *Id.*

4. In an action upon such a contract a copy thereof was annexed to the complaint, which alleged performance, stated the amount unpaid and demanded judgment therefor. The answer denied the complaint and set out as a counterclaim that plaintiff abandoned the contract before completion and that defendant, after due notice under a provision of the contract, authorizing him in such case so to do, completed the building in accordance with the stipulations, at a cost specified, and also had sustained damages by reason of the delay. On the trial plaintiff testified, in detail, as to what he had done under the contract, and proof was given of demand upon the architect for a certificate, which was refused. Defendant claimed a failure to perform the contract in several particulars, and upon cross-examination of plaintiff called out the fact that notice had been served on him under the contract and that defendant had proceeded thereunder to complete the work. At the close of plaintiff's evidence the court dismissed the complaint on the ground that it contained no averment that the architect unreasonably refused a certificate of the completion of the work. *Held*, error; that while it was not too late to then raise the objection, and no application having been made to amend the complaint, it was in the discretion of the court to entertain it, yet, by calling out the testimony that defendant had, after notice, proceeded to complete the contract, this opened the issue, and as the provision of the contract under which defendant acted, entitled plaintiff to recover the difference between the last

installment and the amount expended by defendant in completing the work, this rendered the certificate unnecessary, and the case should have gone to the jury upon the issue so litigated. *Id.*

5. Defendants, being about to erect a building in the city of New York upon a lot adjoining a store leased and occupied by plaintiffs, which required an excavation below the foundation of plaintiffs' store, entered into a contract with a firm of professional "shorers," by which that firm agreed "to do the shoring, sheath-piling and bridging (as required by law) that is necessary to erect" the building on defendants' lot, and to be responsible for any accident by improperly doing the work. Said firm, as plaintiffs' evidence tended to show, without their permission and against their protest, entered upon their premises, broke through the walls, inserted needle beams, and occasioned serious damage to their stock of goods. It did not appear that defendants gave any directions to the contractors, advised the entry, or had any knowledge of the circumstances under which the latter entered upon plaintiffs' premises. In an action of trespass the trial court charged that if plaintiffs gave no license to the contractors defendants were liable for the injury. *Held*, error; that defendants had a lawful right to make the excavation, and no duty rested upon them to protect plaintiffs' building save as imposed by the act of 1855 (Chap. 6, Laws of 1855), which requires lot owners in said city proposing to excavate their lots to a depth of more than ten feet to protect, at their own expense, a wall on adjacent premises at or near the boundary line "if afforded the necessary license to enter on the adjoining land and not otherwise;" that the contractors were not authorized by the contract to enter plaintiffs' premises without permission, but were simply employed to discharge the obligation imposed upon defendants by said act, which required consent as a pre-requisite to such entry.
Ketcham v. Newman. 205

6. In June, 1873, L. executed to D. a mortgage as security for the payment of the sum of \$60,000, which sum by the terms of the mortgage was to be paid one year from date. An agreement was executed by D. at the same time stating the intent of the mortgage to be to secure him against liability as indorser for L., the amount of which was stated to be unknown but supposed to be about \$32,000; also to secure advances to satisfy judgments which were a lien upon the lands mortgaged, D. agreeing to take care of and protect L. and his property from the enforcement of any of said judgments. During the year D. paid out large sums of money under the agreement; a year thereafter he foreclosed the mortgage by advertisement. The foreclosure was conducted in accordance with the statute. The notice, which stated the amount claimed to be due on the mortgage, was duly served on L. In an action brought in September, 1883, against the executrix of D. for an accounting and to redeem the lands sold under the mortgage, it appeared that at the time of the foreclosure D. had paid out under the agreement over \$42,000, and that there remained outstanding, judgments which were liens on the premises to the amount of \$20,000; also that there was indorsed paper outstanding, the whole amounting to much more than the sum secured. It was claimed by plaintiff that the foreclosure was premature because D. had not paid off all of the judgments. *Held*, untenable; that the agreement did not alter or change the maturity of the mortgage, and while D. became bound for the eventual payment of the judgments, he had the right, after the expiration of the year, to resort to the property itself for the means of carrying out the contract, he being bound in the meantime only to pay judgments when necessary to prevent a sacrifice of the property or an enforcement against L. personally. *Lewis v. Duane.* 302
7. It was claimed that the papers executed constituted a trust. *Held*, untenable; that the relations of the parties were simply those of mortgagor and mortgagee. *Id.*
8. It appeared that D. in some cases when he paid judgments did not have them discharged of record, but caused them to be transferred to his wife, who was a sister of L.; this was done with the assent of the latter. *Held*, that as none of the property of L. was wasted or sacrificed on execution sales, the agreement of D. was fully performed; that the mode of protecting L. resorted to was within the scope of the agreement. *Id.*
9. Plaintiff and the H. L. Co. entered into an agreement to the effect that the company would make engravings upon stones from designs furnished by plaintiff, at a stipulated price for each engraving, make prints therefrom for him when requested at agreed prices, and would print from them for no one else, the ownership of the engravings to be in him, and of the stones in the company. Plaintiff paid for the engravings. The stones were subsequently sold under chattel mortgages executed by the company, and thereafter came into defendant's possession. Plaintiff tendered the value of the stones themselves, and demanded delivery, which defendant refused. In an action for conversion, *held*, that the complaint was properly dismissed, as plaintiff failed to show any property in or right to the possession of the stones; that if, by parting with them, the company disabled itself from performing the agreement, while it exposed itself to an action for the breach, no rights of plaintiff attached to and followed the stones into the hands of strangers, at least only such as equity might recognize. *Knight v. S. & W. L. Co.* 404
10. By a building contract it was provided in the specifications as to plastering that "King's Windsor cement" should be used and that the work should be done under the direction of a superintendent of King & Co. In another specification it was directed that the cement should be mixed "with equal parts of good, sharp and

dry sand." It was also provided that in case any dispute should arise respecting the true construction of the specifications, the same should be decided by B., the architect, "whose decision shall be final and conclusive." Plaintiff took a sub-contract to do the plaster work. In an action to foreclose a mechanic's lien, it appeared that the mixture used was two parts sand and one of cement. Evidence was given by plaintiff to to the effect that the variation from the specifications was by the direction of said superintendent. A letter written by the architect to plaintiff was also given in evidence, in which the writer, after stating that plaintiff was not doing the work according to contract, or following the instructions of the superintendent, required him to follow those instructions "to the letter." *Held*, that the superintendent had no authority under the contract to change the proportions of the mixture as fixed by the specifications, nor did the letter give any such authority; and so, a finding that plaintiff failed to perform his contract was proper. *Fitzgerald v. Moran*. 419

11. While it is one of the pre-requisites to the specific performance of an alleged parol agreement for the purchase and sale of land that the agreement shall be clearly proved and certain as to its terms, this rule is to be observed and enforced in the courts below which deal with the facts, and when such an agreement has been there found upon conflicting evidence, and is certain in its terms as found, it must be taken as clearly established within the rule, and the findings are conclusive here. *Dunkel v. Dunkel*. 427

12. The granting of relief by way of specific performance of such a contract is largely in the discretion of an equity court, and where it is granted without violating any fixed rule of equity, the discretion is not reviewable here. *Id.*

13. While, as a general rule, mere payment of the purchase price, under such a contract, is not suf-

ficient to authorize specific performance, where possession has also been taken by the purchaser, the contract will be specifically enforced, and to take the case out of this rule the circumstances must be peculiar and exceptional. *Id.*

See INSURANCE (FIRE).

INSURANCE (LIFE).

LEASE.

SALES.

VENDOR AND PURCHASER.

CONVERSION.

1. In an action for the conversion of certain machinery which had been used by plaintiff for several years before the alleged conversion, plaintiff was permitted to prove, under objection and exception, what the machinery cost when new. *Held*, no error, that the testimony was some evidence of value. *Hawver v. Bell*. 140

2. Counsel for defendants requested the court to charge that the purchase price was not the true rule of damages or the value of the property; to this the court assented, adding "it is only some evidence as to its value as a new and perfect machine." No motion was made for a nonsuit, or exception taken presenting the question that there was no sufficient evidence of value to sustain a verdict. *Held*, that the question could not be raised upon appeal. *Id.*

3. Prior to May 8, 1884, plaintiff had deposited with B. & Co., who were bankers and brokers in New York city, 100 shares of corporate stock as security for any indebtedness to that firm. On that date B. & Co., without the knowledge or consent of plaintiff, pledged said stock, with other shares of stock belonging to said firm, with S. & Co. as security for a loan. The loan was made subject to the rules of the New York Stock Exchange, of which the member of each firm who negotiated it was a member. The latter firm were *bona fide* pledgees, having no knowledge that B. & Co. were

not the owners of all the stock pledged. Plaintiff was not in fact at the time of the pledge equitably indebted to B. & Co. in any sum whatever, and did not thereafter become so indebted. On May 14, 1884, B. & Co. failed, and made an assignment. Plaintiff on that day learning of that fact, and also then learning for the first time that his stock had been so pledged, notified S. & Co. of his interest, and requested a statement of the amount for which his stock was held. S. & Co. refused to give any information, or to recognize plaintiff's rights. S. & Co. on the same day, without notice to plaintiff or B. & Co., and in violation of the rules of the said exchange, sold all the stock so pledged. Plaintiff's stock sold for about \$8,000, and after applying the proceeds of all the stock pledged in payment of the loan, there remained about \$3,000 in the hands of S. & Co. Plaintiff did not learn of the sale of his stock until June 21, 1884, at which time the price of said stock had reached par, and the prices of the other stock sold had so advanced that if they had been held and then sold the proceeds would have paid the loan, leaving plaintiff's stock free from any claim. In an action for conversion S. & Co. claimed the right to apply the balance in their hands upon another debt due them from B. & Co. *Held*, untenable; also, that while S. & Co., as *bona fide* pledgees, were entitled to regard B. & Co. as owners of all the stock pledged until notified of plaintiff's rights, having been so notified prior to the sale, he then stood, with reference to his stock, as surety, with the right to compel them to apply the proceeds of the other stocks before resorting to his stock; that as to his stock, he had the right to require a sale in accordance with the rules of the Stock Exchange, and could treat the unlawful sale as a conversion, and after the proceeds of the sale of the other stocks had been applied to the payment of the loan, he was entitled to the highest price which his stock reached within a reasonable time after its illegal sale, and to judgment for that

sum, deducting therefrom the balance due S. & Co. after such application; and that as plaintiff did not learn of the sale until after June twenty-first, that was a reasonable time; but *held*, in regard to the other stock sold, plaintiff was not entitled to charge S. & Co. with the highest price because of the unlawful sale, and so long as it sold at its full market value at the time of sale, he could not complain. *Smith v. Scrin*. 815

4. Where a stock broker sells, without due notice, stock purchased by him on a margin for a customer, he does not thereby, as matter of law, extinguish all claim against the customer for the advance made; the customer is simply entitled to be allowed as damages the difference between the price for which the stock was sold and its market price then or within such reasonable time after notice of sale as would have enabled him to replace it in case such market price exceeded the price realized. *Minor v. Beveridge*. 399

5. Plaintiff and the H. L. Co. entered into an agreement to the effect that the company would make engravings upon stones from designs furnished by plaintiff, at a stipulated price for each engraving, make prints therefrom for him when requested at agreed prices, and would print from them for no one else, the ownership of the engravings to be in him, and of the stones in the company. Plaintiff paid for the engravings. The stones were subsequently sold under chattel mortgages executed by the company, and thereafter came into defendant's possession. Plaintiff tendered the value of the stones themselves, and demanded delivery, which defendant refused. In an action for conversion, *held*, that the complaint was properly dismissed, as plaintiff failed to show any property in or right to the possession of the stones; that if, by parting with them, the company disabled itself from performing the agreement, while it exposed itself to an action for the breach, no rights of plaintiff at-

tached to and followed the stones into the hands of strangers, at least only such as equity might recognize. *Knight v. S. & W. L. Co.* 404

CORPORATIONS.

1. In the assessment of taxes upon a corporation under the act of 1857 (§ 3, chap. 456, Laws of 1857), it is entitled to have its indebtedness deducted from the value of its corporate assets. *People ex rel. v. Barker.* 196

2. The attorney-general cannot maintain an action in the name of the People against a corporation, either under the Code of Civil Procedure (§ 1948) or as a matter of common law, to restrain the commission of a nuisance in a city street by a corporation, where local officials have authority to protect the street. *People v. Equity G. L. Co.* 232

3. Accordingly held, that an action brought by the attorney-general in the name of the People was not maintainable against an incorporated gas light company, a contractor with it and one of its officers, to restrain the laying of gas pipes in a street in the city of Brooklyn, which was based on the ground that the corporate power of the company had ceased because of failure on its part to commence its business within the period prescribed by law, and that the work would be an injury to the highway and a nuisance. *Id.*

4. Under the provisions of the Corporation Tax Act (Chap. 542, Laws of 1880), added by the amendment of 1889 (Chap. 463, Laws of 1889), giving to the state comptroller power to revise and adjust any account theretofore settled against a corporation for taxes arising under the act, and authorizing a review by certiorari of the action of the comptroller, relief may be given as provided where a tax has been imposed upon and paid by a corporation which was exempt from any taxation under the act. *People ex rel. v. Wemple.* 471

5. The fact that the payment was not made under coercion does not deprive the corporation of the relief so granted. *Id.*

6. Where a corporation made a report to the comptroller stating facts from which the amount of the illegal tax was ascertained and imposed, held, that this did not amount to a stipulation by virtue of which such tax was paid within the meaning of the section (§ 2) exempting such a case from the application of said provisions. *Id.*

7. The United States is to be regarded as a body politic and corporate, and so far as this state is concerned, it is a foreign, not a domestic, corporation. (Code Civ. Pro. § 3343, sub. 18.) *In re Merriam.* 479

8. Under the provision of the Collateral Inheritance Act of 1892 (§ 1, chap. 399, Laws of 1892), which imposes a tax upon the transfer, "by will or intestate law," of any property of the value of \$500, "to persons or corporations not exempt by law from taxation," a bequest to the United States is subject to the tax so imposed. *Id.*

9. The tax is not imposed upon the property, but on the right of succession under the will, and the property that vests under it in the United States is the net amount of the bequest after the succession tax is paid. *Id.*

10. Stocks of foreign corporations, held by an executor as such, are to be regarded as part of the estate, and so the right of succession thereto is subject to payment of the tax imposed by said act. *Id.*

See ASYLUMS.

INSOLVENT CORPORATIONS.
INSURANCE CORPORATIONS.
FOREIGN CORPORATIONS.
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
RELIGIOUS CORPORATIONS.

COSTS.

An award of costs against an executor or administrator, without a

certificate of the trial judge showing the facts upon which such an award must be based, is error. (Code Civ. Pro. §§ 1885, 1886.) *Matson v. Abbey.* 179

COUNTY TREASURER.

Upon a claim presented to the Board of Claims the following facts appeared: M., who was a county treasurer, had received the taxes collected from his county for state purposes, which he had neglected to pay over. The state comptroller made a demand for payment. M. was at the time cashier of the claimant, and as such had in his possession blank drafts addressed to the claimant's correspondent bank in New York, and as cashier had power to draw drafts on that bank for himself as well as for others, and upon the same terms. M. filled up one of these blank drafts with the amount due the state, making it payable to the order of the comptroller; signed his name thereto as cashier, and forwarded it to that officer as payment for such taxes. The comptroller received and indorsed it, and upon presentation it was paid by the New York bank; the obligation of M. and his county was thereby discharged and the proceeds applied to the uses of the state. When M. drew and signed said draft he paid no money to the claimant and had none on deposit with it to his credit; he made no entry thereof upon its books, and kept all knowledge of it concealed from the other officers of the bank; he was then hopelessly insolvent, and about a month thereafter absconded. The comptroller received the draft in good faith and without knowledge that it was issued by M. wrongfully and without authority. *Held*, that the state was not liable to refund the money so received; that the act of M. was within the scope of his general powers and apparent authority, and there was nothing in the form of the draft charging the state or its officers with notice that he was using the funds of the claimant to pay his individual debt; on the contrary, that the comptroller when he received it had the right

to regard it as the property of the cashier regularly in his possession and proper to be used by him in payment of the taxes. *Goshen Nat. Bank v. State.* 879

COUNTIES.

See SUFFOLK (COUNTY OF).

COURTS.

See BOARD OF CLAIMS.
COURT OF APPEALS.
SURROGATE'S COURT.

COURT OF APPEALS.

1. While after appeal to this court, in all matters pertaining to the appeal itself and to the proper hearing of, as well as all applications which by statute may be made to this court, it has jurisdiction, as to all other applications the case is to be regarded as still pending in the court of original jurisdiction, and such applications should be made to that court. *People ex rel. v. Bd. Edn.* 86
2. Where, therefore, after appeal to this court the appellant's attorneys at her request substituted another in their place, *held*, that a motion for order directing the former attorneys to turn over the papers in the case to the substituted attorney was not properly made here, but should have been made in the court below. *Id.*
3. The jurisdiction of this court on appeal from a judgment of General Term affirming a surrogate's decree on settlement of the accounts of executors is limited to questions of law presented by proper exceptions. *In re Bolton.* 554
4. It is not to be assumed because a fact appearing in the record or authority cited on argument in this court which is deemed important by counsel, is not noticed or commented on in the opinion that it has not been considered and due weight given to it in

arriving at the decision, and the omission to notice it is not ground for a motion for re-argument. *Dammert v. Osborn.* 564

5. Where the law of a case has been determined after full argument and consideration by the Second Division of this court, and upon a second appeal substantially the same facts appear, not changed in any material respect, the questions of law will not be considered, but the parties will be held as concluded by the former decision; at least where the case affects no general public interest, and the decision so made establishes no doctrine in hostility to the previous law as declared by this court, and this, *it seems*, although if the case was *res nova*, the court might be of the opinion that the law of the case was erroneously adjudged. *Cluff v. Day.* 580

See APPEALS.

CRIMES.

1. While to constitute a crime it is not necessary in all cases that the person charged should know that the statute prohibits the act, where a particular intent is an ingredient, the mere doing of the prohibited act does not constitute the crime unless accompanied with the unlawful intent. *Hewitt v. Newburger.* 538

2. While the provision of the Penal Code defining the offense of intrusion on lands (§ 467) does not in terms make the intent a material element to constitute the offense, an unlawful and criminal intent must be alleged and proved. *Id.*

See LARCENY,
MANSLAUGHTER,
MURDER.

CRIMINAL TRIAL.

1. It is competent for the court, on a criminal trial, on its own motion, to strike out improper evidence and instruct the jury to disregard it, and it will be assumed on ap-

peal that the instructions were obeyed, and so, the reception of the evidence is not a ground for reversal on appeal. *People v. Wilson.* 185

2. Where the judge in charging the jury on such a trial lays down an erroneous proposition, but upon his attention being called thereto by objection, corrects the misdirection and lays down the proper rule, no error is presented for review. *Id.*

3. Upon the trial of an indictment for murder in killing H., a police detective, who had the defendants under arrest at the time of the homicide, the prosecution was allowed to prove that previous to the homicide a burglary had been committed, also, to prove facts and circumstances tending to show that H., when he made the arrest, had reasonable grounds to believe defendants had committed that crime. *Held*, no error; that the evidence was competent as showing that H. was justified in making the arrest without a warrant. (Code Crim. Pro. § 177, subd. 3.) *Id.*

4. L. and C. were jointly indicted; they demanded separate trials. On the trial of L. the evidence for the prosecution showed these facts: On the day of the homicide the defendants entered a restaurant; a burglary had been previously committed; as they passed the bar a waiter said in their hearing: "There goes the burglars." The proprietor of the restaurant telephoned to police headquarters, and in a few minutes H. came; he followed defendants as they went out on the street, tapped them on the shoulders, and, after stopping in a doorway, apparently in conversation, for a short time, proceeded with them toward the police station. Being compelled to turn out into the street because of an obstruction on the sidewalk, H. took each prisoner by the arm. After proceeding a short distance, C., exclaiming "let her go," drew his revolver, seized H., drew him around and struck him on the head with the weapon. L. broke away from the grasp of H., and,

when eight or ten feet distant, turned and deliberately shot him through the head, killing him instantly. *Held*, that a verdict of murder in the first degree was justified. *Id.*

5. When L. was arrested it appeared that he had two revolvers, both of which were loaded; he was found secreted under a stoop; he had had abundant opportunity to re-load, and there was testimony tending to show he was engaged in that act when crossing a bridge after the shooting, and when arrested, cartridges, fitting both of his revolvers, were found upon his person. *Held*, the fact that the revolvers were found loaded was not material. *Id.*

6. A statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, after conviction, is not violative of the provision of the State Constitution (§ 5, art. 4) giving to the governor the power to grant reprieves and pardons. *People ex rel. v. Ct. of Sessions.* 288

7. The distinction between the two powers pointed out. *Id.*

8. *It seems*, however, the legislature cannot authorize such courts to so limit the exercise of their discretion to inflict punishment when deemed proper, in a case where sentence has been suspended, as to make such exercise dependent upon compliance on the part of the person convicted with some condition that will require the court to try a question of fact before it can impose the punishment. *Id.*

9. The provision of the Penal Code (§ 12) as amended in 1893 (Chap. 379, Laws of 1893), which declares that a criminal court, in certain cases, "may in its discretion, suspend sentence during the good behavior of the person convicted," does not express such a condition, and does not preclude the court from passing the proper sentence whenever it appears to it to be proper. *Id.*

10. Where, therefore, a Court of Sessions, after a conviction of the crime of grand larceny, suspended

sentence during good behavior, *held*, that this was within the jurisdiction of the court, and so that the granting of a writ of mandamus upon application of the district attorney, requiring said court to proceed to sentence and judgment, was error. *Id.*

CUSTOM.

Plaintiff, through a broker, sold to defendant certain parcels of canary seed described in the broker's note as to each parcel as "March steamer shipment from Turkey," the name of the steamer being given. After stating the price and that the seal was to be paid for within a time specified "from date of delivery on dock in New York," each note contained this clause: "Goods to be taken from dock on arrival of steamer when ready for delivery." The parcels were shipped by the steamer named to Liverpool, and there transhipped to another steamer which brought them to New York, where they were tendered to defendants, who refused to accept solely on the ground that the seed was not brought by the steamer named direct to New York. On trial of an action to recover damages plaintiff offered to prove that at the time of sale there was not and never had been freight steamers sailing direct from Turkey to New York, and that the invariable custom was to carry goods to Liverpool, and there transfer them to a steamer for New York. This evidence was excluded. *Held*, error; that the broker's notes did not in explicit terms require a shipment direct in the same steamer from Turkey to New York; that while the steamer of shipment was identified that of arrival was not, and the language of the contract admitted of a doubt as to whether the intent was that both were to be the same, and to solve this doubt the evidence was proper. *Iasigi v. Rosenstein.* 414

DAMAGES.

1. In 1835 the commissioners appointed under the act of that year

to lay out streets, etc., in the city of Brooklyn (Chap. 133, Laws of 1835) made and filed a map showing a street passing over lands owned by H. The street was never actually opened or regulated. In 1851 H. conveyed the adjoining lands by deed which contained a reservation of his title and interest in the land forming the street. In 1864 the department of assessment of the city made and filed a map including said lands in which the street appeared substantially as in the map of 1835, and since then no assessment has been made or tax levied upon the land of H. included in said street. In 1879 the executors of H. filed a map of his lands, laid out in streets, blocks and lots, corresponding with the commissioners' map, with a notice, however, indorsed thereon to the effect that it was not intended to dedicate any of the lands lying within the lines of the streets to public use; afterwards said executors conveyed lots, bounding them upon said streets, and including the land within the street lines in front of the lots conveyed. In proceedings instituted by the municipal authorities to acquire title for street purposes to the lands within the lines of said street as so laid out, *held*, that H. and his executors, as between themselves and their grantees, devoted the lands to use as a street, and the latter acquired an easement therein for that purpose; that the executors were only entitled to an award for the value of the public easement, deducting therefrom the value of the private easement, and as the added burden was merely technical and nominal they were only entitled to nominal damages. *In re Adams*. 297

2. Where a stock broker sells, without due notice, stock purchased by him on a margin for a customer, he does not thereby, as matter of law, extinguish all claim against the customer for the advance made; the customer is simply entitled to be allowed as damages the difference between the price for which the stock was sold and its market price then or within such reasonable time after

notice of sale as would have enabled him to replace it in case such market price exceeded the price realized. *Minor v. Beveridge*. 399

3. One who does an act, lawful in itself, upon the land of another, under the authority of the owner, is not liable in damages to the proprietor of adjoining lands for consequential injuries remotely resulting from the act, not naturally to be anticipated and flowing from occult causes which could only be conjectured by men of science, or disclosed by actual experience. *Covert v. Cranford*. 521

— *As to amount of damages recoverable in an action for conversion of stock pledged to secure a loan and unlawfully sold by pledgee.*

See Smith v. Savin.

815

DEBTOR AND CREDITOR.

Plaintiff executed to her half-brother C., defendant's testator, a power of attorney, authorizing him to collect the amount of an insurance policy held by her upon the life of her deceased husband. C. collected the amount, and without the consent of plaintiff appropriated it to his own use, and never paid the same or any part thereof or accounted to her therefor. On reference of a claim for the amount it appeared that for more than ten years before the presentation of the claim, plaintiff supposed and believed C. had received the money, but that she never demanded the same. *Held*, that the claim was properly dismissed on the ground that it was barred by the Statute of Limitations; that no trust or fiduciary relation existed between the parties growing out of their relationship, which required a demand or actual knowledge of the facts by plaintiff before the right of action accrued; and that the only legal relation between the parties was that of debtor and creditor. *Wood v. Young*. 211

See JOINT DEBTOR.

DEED.

1. In the plaintiff's chain of title, proved in an action to remove cloud on title, was a deed to three persons, who were described as trustees of a land association. It did not appear that the association was incorporated, or capable as such of taking a legal title. *Held*, it was to be assumed that the association was a partnership of individuals, of which the grantees were members, holding the legal title for the benefit of themselves and others, and so they were not mere trustees, holding simply a nominal title, and the provisions of the Revised Statutes (1 R. S. 728, §§ 49-58), taking away such a title and vesting it in the beneficiary, did not apply; and, therefore, whether the deed was to be regarded as one to the grantees named individually, or as a conveyance for their benefit and that of others, they had authority to sell and convey a good title. *King v. Townshend*. 358
2. In 1848 plaintiff conveyed certain lands to the town of Yonkers, whose rights have since become vested in defendant, the city of Yonkers. The deed contained a condition that the land conveyed should forever remain public and open as a public highway, and that no house, or other erection save a public monument, should ever be built, erected or permitted thereon. In 1857 the line of the land was located by competent engineers, and defendant H., who owned adjoining lands, erected a building coming up to said line; this was recognized as the true line by the city. H. also constructed an area under the surface of the ground in front of said building, about four feet wide, with a stairway leading down from the street; over this area is a sidewalk with gratings and a door to the stairway, which, when closed, constitute no obstruction. In an action of ejectment to recover possession of the land conveyed, based on the ground of forfeiture of title because of alleged breach of said condition, it was found, upon con-

flicting evidence, that the building, which was sixty-three feet in length, encroached at one end sixteen inches, and at the other, two inches upon the land conveyed. Plaintiff saw the building erected, and for more than twenty years made no claim of a breach of said condition. *Held*, that, under the circumstances shown, it did not appear that the city had done, or knowingly permitted anything which amounted to a breach of the condition within any fair and reasonable construction of the condition, or the intention of the parties to the deed when it was executed; also, that no permission to erect the building, such as was contemplated by the parties to the contract, was shown. *Rose v. Hawley*. 366

8. In an action by the vendor to enforce specific performance of a contract for the purchase and sale of land, plaintiff claimed title under a deed with covenant of warranty, which contained conditions substantially as follows: The grantees shall have an equal interest in the property, and shall control and direct the same after the death of the grantor; upon the death of one of the grantees the other to have such control during life; neither "shall have the right to convey by deed" without the consent of the grantor, but it may be arranged to be disposed of by will by the survivor, or by mutual will of the grantees, to take effect after the death of both. The habendum clause was to the grantees, their "heirs and assigns forever." The grantor was dead at the date of the deed from the grantees to plaintiff. *Held*, that said grantees had power to alien their life estate after the death of their grantor; and so, that their conveyance with warranty conveyed the fee. (1 R. S. 732-733, §§ 81-84.) *Hume v. Randall*. 499

See GRANTOR AND GRANTEE.

DEFENSES.

1. In an action brought by the receiver of an insolvent manufactur-

...the ...

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• **PLATE 1**

[illegible]

tator. I. died thereafter and within the twenty years; at his death T. and A. had no issue living, but thereafter a son was born to them. In an action for the construction of the will, *held*, that as T. and A. had no male issue living at the time of death of I., the devise to their "eldest male issue" lapsed, and the real estate went, not to the heirs of the testator, but into the residuary estate and passed under the residuary clause. *Smith v. Smith.* 29

DIVORCE.

1. In an action for a limited divorce brought by the wife on the ground of alleged cruel and inhuman treatment, defendant in his answer denied the charges of the complaint, set up by way of counterclaim adultery on the part of plaintiff, and asked a judgment of absolute divorce. On the trial plaintiff, before resting, called the person with whom, in the answer, plaintiff was alleged to have committed adultery, who denied the same. On cross-examination he was asked and permitted to answer, under objection and exception, if he did not, at a time and place specified, admit to a person named that his relations with plaintiff were illicit; this he denied. The person named was thereafter called as a witness by defendant, and was permitted to testify that the alleged co-respondent did make the admission. *Held*, no error. *Woodrick v. Woodrick.* 457

2. Plaintiff set up in her complaint that defendant forbade her from visiting her parents. Defendant alleged that the reason plaintiff did not visit her mother was because they had a falling out. Defendant was permitted to testify, under objection and exception, to certain alleged communications of plaintiff's mother to him as to plaintiff's conduct with other men, which he testified he communicated to plaintiff. *Held*, that the evidence was competent. *Id.*

3. Defendant offered and was permitted to give in evidence certain

salacious verses alleged to be in plaintiff's handwriting, and to have been found in her writing desk. *Held*, no error. *Id.*

4. Defendant, a sea captain, on return from a voyage, was met by a person who informed him of certain incriminating evidence against his wife. Defendant was permitted to testify that he proceeded at once to his house and informed plaintiff of the incident, and was permitted to testify to the interview in detail. This was objected to as incompetent under the provision of the Code of Civil Procedure (§ 831) declaring a husband or wife to be incompetent to testify against the other on trial of an action founded on an allegation of adultery, except to prove marriage or disprove the allegation of adultery. It was admitted as competent evidence on the issue as to cruel and inhuman treatment, the court stating to the jury that it was not admitted on the question of adultery. *Held*, no error. *Id.*

EJECTMENT.

1. After judgment in an action of ejectment an order was granted under the Code of Civil Procedure (§ 1525), setting aside the judgment and granting a new trial. Subsequently, on motion of defendant, an order was granted setting aside said prior order, amending and modifying the judgment and execution, with leave to apply again for leave to vacate the amended judgment for the purposes of a new trial, but refusing to set aside the execution, under which plaintiff had been put in possession. On appeal from the order, *held*, that it was one addressed to the discretion of the court below and so was not reviewable here. (Code Civ. Pro. § 190.) *De Lancey v. Piegras.* 88
2. After defendant had secured the amendment to the judgment and execution he again resumed possession of the premises and excluded plaintiff therefrom by force. Upon application of the

latter, defendant was ordered forthwith to restore such possession, and thereafter to desist from any physical resistance or interference with plaintiff's possession. *Held*, that the making of the order was within the power of the court; that plaintiff was not required to resort to some new and independent action or proceeding to regain possession. *Id.*

3. Where in an action of ejectment plaintiffs claimed title under deeds given under a judgment in a partition suit, to which defendants were not parties and had no connection therewith, *held*, that in order to sustain the action, and in the absence of any proof of possession of the land by the parties to the partition suit or their predecessors in interest, plaintiff was bound to show a subsequent possession prior to the possession of defendant; also that mere payment of taxes, claim of title and assertions of ownership, even when made upon the land, did not show the actual possession which raises the presumption of title sufficient to maintain ejectment. *Greenleaf v. B., F. & C. I. R. Co.* 395

4. Also *held*, that admissions to the effect that plaintiffs owned the land, made by one from whom defendants took a deed, when neither he nor plaintiffs were in possession, did not bind the defendants who subsequently took possession claiming to be the owners, and who relied upon their possession as sufficient evidence of ownership as against plaintiffs. *Id.*

ELECTION (OF REMEDIES).

—When the owner of stock pledged to secure indebtedness brought action to recover the amount due on sale of stock in ignorance that the sale was unlawful, and upon discovery of this fact was permitted to amend his complaint so as to make the action one for conversion, *held*, that the bringing of the action in its original form was not an election to ratify the illegal sale.

See Smith v. Savin.

315

ELECTION (OF OFFICERS).

1. A school commissioner is a constitutional officer "elected by the People," and so, under the State Constitution prescribing the qualification of voters (Art. 2, § 1), may only be voted for by "male citizens." *In re Gage.* 112
2. Accordingly *held*, that the act of 1892 (Chap. 214, Laws of 1892), conferring upon women the right to vote for school commissioners, is unconstitutional. *Id.*

EMINENT DOMAIN.

1. In 1835 the commissioners appointed under the act of that year to lay out streets, etc., in the city of Brooklyn (Chap. 132, Laws of 1835) made and filed a map showing a street passing over lands owned by H. The street was never actually opened or regulated. In 1851 H. conveyed the adjoining lands by deed which contained a reservation of his title and interest in the land forming the street. In 1864 the department of assessment of the city made and filed a map including said lands in which the street appeared substantially as in the map of 1835, and since then no assessment has been made or tax levied upon the land of H. included in said street. In 1879 the executors of H. filed a map of his lands, laid out in streets, blocks and lots, corresponding with the commissioners' map, with a notice, however, indorsed thereon to the effect that it was not intended to dedicate any of the lands lying within the lines of the streets to public use; afterwards said executors conveyed lots, bounding them upon said streets, and including the land within the street lines in front of the lots conveyed. In proceedings instituted by the municipal authorities to acquire title for street purposes to the lands within the lines of said street as so laid out, *held*, that H. and his executors, as between themselves and their grantees, devoted the lands to use as a street, and the latter acquired an easement therein for that purpose; that the executors were only entitled to an award

for the value of the public easement, deducting therefrom the value of the private easement, and as the added burden was merely technical and nominal, they were only entitled to nominal damages. *In re Adams.* 297

2. Where in proceedings under the General Railroad Act (Chap. 140, Laws of 1850, as amended) to condemn lands for railroad purposes, an award of commissioners is reversed and a new appraisal directed, and upon a second hearing a new award is made, the second report "is final and conclusive on all the parties interested" (§ 18 of said act, as amended by chap. 198, Laws of 1876), and no appeal lies to this court from an order of General Term affirming an order of Special Term confirming the second report. *In re S. & B. R. R. Co.* 532

EQUITY.

1. While a party to a written instrument may not invoke the aid of a court of equity because of a mistake of law on his part, where there is no improper conduct on the part of the other party, where the mistake on his part is shown, and also either positive fraud or inequitable, unfair and deceptive conduct on the other side, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. *Haviland v. Willets.* 35
2. In an action instituted in 1889 to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interest of her co-tenants, who also assigned to her their rights of action and claims for damages. Plaintiff claimed for damages sustained prior to March, 1887, as well as since. On the trial defendants moved that the action be severed and that the claim for damages acquired by assignment be sent to a jury; this

was denied. *Held*, no error; that if the court decided that the claim for equitable relief was well founded, it was within its discretion to assess all the damages sustained to which plaintiff was entitled, whether belonging to her as owner or acquired by assignment, and that defendants had no absolute right to have them determined by a jury. *Hunter v. Manhattan R. Co.* 281

3. Equity may interfere to prevent a threatened cloud on title where there appears to be a determination to create such a cloud, and the danger is not merely speculative or potential. *King v. Townsend.* 358

— When lessor entitled to aid of court of equity to restrain violation by lessee of condition in lease. *See R. L. Association v. Kellogg.* 348

ESTOPPEL.

Notice to a purchaser, when he took a conveyance, that another claimed title under a sale, upon execution issued on a void judgment, does not operate as an estoppel against the former. *McCracken v. Flanagan.* 174

— When party estopped because of delay from recovering of executors moneys paid out unlawfully, but in good faith. *See Haviland v. Willets.* 35

EVIDENCE.

1. Plaintiffs obtained an attachment against a corporation, which was placed in the hands of defendant, as sheriff, who, by virtue thereof, levied upon certain property of the corporation. A. claimed the property and pursuant to an agreement between him, a clerk of one of defendant's deputies and plaintiff's attorney, A. gave a check as security for any judgment plaintiffs might recover, and thereupon the property was delivered up to him, and defendant drew the money on the check. A. commenced an action to recover the same, claiming that the prop-

- erty belonged to him and that the check simply took its place; he recovered judgment, which was paid by defendant. Plaintiffs were not made parties; they obtained judgment in the attachment suit, and having failed to collect, brought this action to recover the amount of the judgment. Plaintiffs put in evidence a copy of an affidavit claimed to have been made by defendant; the original was presented in court and used by his attorney in the action of A. against him as an original, genuine paper. It was objected that there was no proof that defendant signed the original. *Held*, untenable. *Blair v. Flack*. 53
2. The judgment roll in the action of A. against defendant was offered in evidence in his behalf, but was excluded. *Held*, no error; that as plaintiffs were not parties to that action they were not bound by the judgment; also, as defendant had the benefit of the proof that he claimed and recovered in that action the proceeds of the check, the judgment roll was immaterial. *Id.*
 3. In an action by a stock broker to recover a balance alleged to be due from a customer, defendant, on cross-examination of plaintiff, for the purpose of discrediting the alleged purchases, sought to follow through plaintiff's books, not only the transactions in question, but his dealings with other customers. The court allowed this, except as to the names of the other customers. *Held*, that the limitation was within the discretion of the court; that the discretion was reasonably exercised; and so, there was no error. *Gillett v. Whiting*. 71
 4. It was shown what books were kept by plaintiff. Defendant offered to prove by experts what books were usually kept by stock brokers; this was excluded. *Held*, no error. *Id.*
 5. On the trial of an action against executors to recover for services rendered, one of the executors, defendants, who was also a residuary legatee under the will, as a witness for the defense, testified to a conversation with decedent, in the presence of plaintiff. This was objected to as incompetent under the Code of Civil Procedure (§ 829). *Held*, untenable, as the Code simply excluded such testimony when sought to be given against, not when given, as here, in favor of the personal representatives of the deceased. *McLaughlin v. Webster*. 76
 6. P., defendant's testator, was a private banker in New York city; by circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Plaintiff employed P. to loan for him \$25,000, which the latter agreed to do gratuitously; he loaned the money, taking as collateral certain certificates of corporate stock, which had by a forgery been raised so as to represent a larger number of shares than they were issued for, and in consequence a loss resulted. In an action to recover damages defendant offered to show that P. lent \$50,000 of his own money, accepting as collateral similarly raised certificates; also that the certificates in question had been given and received on the street as collateral for loans, and deceived the skill of a great number of bankers and brokers who took and held them without suspicion. This testimony was objected to and excluded. *Held*, error, as the proof, if made, would have shown good faith on defendant's part and would have excused and justified the failure to discover the forgery. *Isham v. Post*. 100
 7. In an action for the conversion of certain machinery which had been used by plaintiff for several years before the alleged conversion, plaintiff was permitted to prove, under objection and exception, what the machinery cost when new. *Held*, no error; that the testimony was some evidence of value. *Hawcer v. Bell*. 140
 8. Declarations of a deceased person, made when he was in possession of real estate, in reference to his

- title thereto, which were against his interest, may be given in evidence even in an action between third parties where the title comes in question. *Lyon v. Ricker*. 225
9. Plaintiff's complaint alleged that his father executed and delivered to defendant a warranty deed conveying certain premises then in the possession of the grantor to plaintiff, with instructions to deliver the same to the latter on the death of the grantor, and that defendant, upon demand made after such death, refused to deliver the same. Defendant's answer denied certain of the allegations of the complaint, but made no claim to the deed or any interest in it, simply stating that he "retains possession of the deed for the reason that he does not know to whom to deliver it or his duties in the premises." The only evidence as to the purpose of the delivery of the deed to defendant was testimony of declarations of the grantor after making the deed, and while in possession of the land, to the effect that he had made out the deed in question, and another deed to plaintiff's brother, and left them with defendant, to be given to the grantees on his (the grantor's) death. *Held*, that the evidence was competent; and so, that objections thereto were properly overruled. *Id.*
10. One of the witnesses to prove these declarations was said brother. *Held*, that the fact that he occupied the same position as plaintiff, while it might go to his credibility, did not render his testimony incompetent. *Id.*
11. The testimony of defendant as a witness in his own behalf, as to what took place between him and the grantor was offered and rejected. *Held*, no error (Code Civ. Pro. § 829); that the testimony was not made competent by the fact that the declarations of the grantor made at other times had been received on behalf of plaintiff. *Id.*
12. In an action against an elevated railroad company to recover damages caused by the operation of its road in front of plaintiff's premises expert evidence is admissible to show the general effects caused by the maintenance and operation of the road upon abutting and neighboring properties. *Hunter v. Manhattan R. Co.* 281
13. In an action to redeem lands sold upon foreclosure of a mortgage by advertisement, it appeared that the attorney who foreclosed the mortgage for D., the mortgagee, was dead at the time of the trial. Plaintiff offered to prove that said attorney told the mortgagor that the foreclosure would make no difference as to the agreement between him and D. This was objected to and excluded. *Held*, no error. *Lewis v. Duane*. 302
14. Under a general denial in an action on contract, defendant may controvert by evidence anything which plaintiff is bound to prove in the first instance to make out his cause of action, and anything he is permitted to prove for that purpose. *Milbank v. Jones*. 340
15. Plaintiff's complaint alleged in substance the receipt by defendant of \$5,000 to be held in trust for plaintiff, the trust to be terminated at the election of the latter on or after a day specified; that after that day plaintiff notified defendant of his election to terminate the trust and demanded the money, which defendant refused to pay. The answer was a general denial. Upon the trial plaintiff was permitted to prove an agreement by which defendant acknowledged receipt of the sum specified, which he agreed to return to plaintiff in case a certain resolution of the common council of New York city should not pass and take effect before a day specified. Defendant offered to prove that plaintiff, subsequent to the making of the agreement, extended the time for the passage of the resolution; that it was passed and went into effect on the day specified; that defendant delivered to plaintiff a certified copy thereof, and that the latter accepted it as performance. This was objected to and excluded. *Held*, error. *Id.*

16. In proceedings for the probate of a will which is contested on the ground that there was no due publication of the will, a beneficiary under it is incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication. What occurred at that time is a transaction between the testator and the witness within the meaning of the Code of Civil Procedure (§ 829), although the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witnesses. *In re Bernae*. 389
17. Plaintiff through a broker sold to defendant certain parcels of canary seed described in the broker's note as to each parcel as "March steamer shipment from Turkey," the name of the steamer being given. After stating the price and that the seed was to be paid for within a time specified "from date of delivery on dock in New York," each note contained this clause: "Goods to be taken from dock on arrival of steamer when ready for delivery." The parcels were shipped by the steamer named to Liverpool, and there transhipped to another steamer which brought them to New York, where they were tendered to defendants, who refused to accept solely on the ground that the seed was not brought by the steamer named direct to New York. On trial of an action to recover damages plaintiff offered to prove that at the time of sale there was not and never had been freight steamers sailing direct from Turkey to New York, and that the invariable custom was to carry goods to Liverpool, and there transfer them to a steamer for New York. This evidence was excluded. *Held*, error; that the broker's notes did not in explicit terms require a shipment direct in the same steamer from Turkey to New York; that while the steamer of shipment was identified that of arrival was not, and the language of the contract admitted of a doubt as to whether the intent was that both were to be the same, and to solve this doubt the evidence was proper. *Iasigi v. Rosenstein*. 414
18. In an action for a limited divorce brought by the wife on the ground of alleged cruel and inhuman treatment, defendant in his answer denied the charges of the complaint, set up by way of counterclaim adultery on the part of plaintiff, and asked a judgment of absolute divorce. On the trial plaintiff, before resting, called the person with whom, in the answer, plaintiff was alleged to have committed adultery, who denied the same. On cross-examination he was asked and permitted to answer, under objection and exception, if he did not, at a time and place specified, admit to a person named that his relations with plaintiff were illicit; this he denied. The person named was thereafter called as a witness by defendant, and was permitted to testify that the alleged co-respondent did make the admission. *Held*, no error. *Woodrick v. Woodrick*. 457
19. Plaintiff set up in her complaint that defendant forbade her from visiting her parents. Defendant alleged that the reason plaintiff did not visit her mother was because they had a falling out. Defendant was permitted to testify, under objection and exception, to certain alleged communications of plaintiff's mother to him as to plaintiff's conduct with other men, which he testified he communicated to plaintiff. *Held*, that the evidence was competent. *Id.*
20. Defendant offered and was permitted to give in evidence certain salacious verses alleged to be in plaintiff's handwriting, and to have been found in her writing desk. *Held*, no error. *Id.*
21. Defendant, a sea captain, on return from a voyage, was met by a person who informed him of certain incriminating evidence against his wife. Defendant was permitted to testify that he proceeded at once to his house and informed plaintiff of the incident, and was permitted to testify to the interview in detail. This was ob-

jected to as incompetent under the provision of the Code of Civil Procedure (§ 881) declaring a husband or wife to be incompetent to testify against the other on trial of an action founded on an allegation of adultery, except to prove marriage or disprove the allegation of adultery. It was admitted as competent evidence on the issue as to cruel and inhuman treatment, the court stating to the jury that it was not admitted on the question of adultery. *Held*, no error, *Id.*

22. T. & M., plaintiff's assignors, and defendant entered into a contract by the terms of which the former agreed to make a monument for the latter, who, the contract stated, "is to inspect the model when made in clay, and it is to be made to his entire satisfaction." In an action for an alleged breach of the contract, plaintiff gave evidence to the effect that defendant inspected the model when finished and expressed his entire satisfaction therewith. This was denied by defendant, who testified that, on the contrary, he expressed dissatisfaction, specifying various defects and objections. Plaintiff was permitted, against the objection of defendant, to read in evidence a letter from M. to defendant which, among other things, stated in substance that the model had been on exhibition in the studio of T. & M. for about a month, and that hundreds of visitors, professional and business men and women, unanimously commended it; this was followed by a statement of what various persons, who were named, had said upon the subject. *Held*, that the admission of the letter in evidence was error, requiring a reversal of the judgment. *Thomas v. Gage*. 506

EXCISE.

1. The Civil Damage Act of 1873 (Chap. 646, Laws of 1873) was not repealed by the provision of the act of 1892, "in relation to excise" (§ 2, chap. 403, Laws of 1892), providing for the recovery of damages caused by the sale of intoxicating liquors in case pre-

vious notice has been given forbidding the sale. The said provision and the one upon the same subject in the act of 1892, "to revise and consolidate the laws in relation to the sale of intoxicating liquors" (§ 40, chap. 401, Laws of 1892), are to be read as simply amendatory of the act of 1873, not as repealing it by implication. *Quinlan v. Welch*. 158

2. A cause of action, therefore, which accrued prior to said amendments was not affected thereby. *Id.*

EXECUTION.

1. In an action brought by the receiver of an insolvent manufacturing corporation to set aside a transfer of property to defendant, made by the corporation in contemplation of insolvency, and so in violation of the statute (1 R. S. 603, § 4), and to compel payment of its value, the answer set up as a defense that subsequent to the transfer and before the appointment of plaintiff as receiver, third parties, under a judgment and execution against the corporation, sold the property as the property of the corporation, and so that plaintiff took no interest therein. It appeared that the amount bid on the execution sale was one dollar, and such sale was made for that sum. *Held*, that a finding was justified that the sale was made subject to the transfer. *Stonebridge v. Perkins*. 1

2. It did not appear that the sheriff ever made an actual levy under the execution, and at the time the sale was made the property was not present or within the view of those attending the sale. *Held*, that no valid sale was established. *Id.*

3. A sale of personal property upon execution affords no protection to a party defending under it, unless he shows, *first*, a levy, *i. e.*, such an exercise of right and dominion by the officer over the property as would subject him to an action of trespass by the owner if the levy was not justified, and

second, a sale with the property actually present and within the view of the persons attending the sale. *Id.*

4. A sale of land on execution, issued upon a void judgment against the owner, in no way affects his title, and a subsequent conveyance by him is just as effectual as if the judgment had never in form been entered. *McCracken v. Flanagan.* 174

5. A purchaser on sale of land on execution, having paid the purchase price, and received the sheriff's certificate of sale, after obtaining the sheriff's deed is in the same position as if the deed had been executed by the judgment debtor when the judgment was docketed, and while holding the certificate he is to be regarded the same as if the debtor had at the time of docketing the judgment executed a contract of sale and received the full purchase price. *Maroney v. Boyle.* 462

6. Such a purchaser, therefore, is entitled to protection against an outstanding and unknown lien for purchase money in favor of a former grantor. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. The commissions of an executor, until ascertained and liquidated in the manner prescribed by law, are not subject to his disposal, but upon grounds of public policy are unassignable. *In re Worthington.* 9

2. Where, therefore, one claiming under an assignment of his commissions, executed by an executor before settlement of his accounts, appealed from an order of the General Term affirming an order of the surrogate denying a motion made by said assignee to open and modify his decree, made on settlement of the accounts of the executors, which decree refused commissions to the assignee, *held*, that the appellant had no interest authorizing him to make the motion or bring the appeal. *Id.*

3. By the will of S. he gave his residuary estate to his wife, "to be used and enjoyed by her" during life or as long as she should remain his widow, and at her death or re-marriage then the same to be equally divided between other persons named in the will; the same to be "received and accepted" by her in lieu of dower. The testator left personal estate only, which was converted into money. The executor died and an administrator with the will annexed was appointed, who incurred some expense as such. Upon settlement of the executor's accounts the surrogate decreed that the whole fund should be paid over by the administrator of the executor directly to the widow, who was then a resident of another state, and that she was entitled to the possession thereof without giving security. *Held*, error; that the administrator with the will annexed was entitled to have the money paid over to him, and if he had made any disbursements, or incurred any obligations properly chargeable to the estate, he was entitled to an opportunity of proving this and to a decree for their payment; also, that the will simply gave to the widow an estate for life or during widowhood, and upon the happening of either event the remaindermen were entitled to the whole *corpus* of the estate; that as the property was not of a kind which must be individually possessed in order to be enjoyed, she was not entitled to possession without giving security. *In re McDougall.* 21

4. An award of costs against an executor or administrator, without a certificate of the trial judge showing the facts upon which such an award must be based is error. (Code Civ. Pro. §§ 1835, 1836.) *Matson v. Abbey.* 179

5. By the will of M. a sum was given to his executors to be held in trust for the benefit of T. during life, the trust fund to be invested in bonds and mortgages, and upon his death to be distributed among his children. In an action by the sole surviving child of T., brought after his death, to.

compel the residuary legatees to account, and to pay the amount of the trust fund, it appeared that there had been a final accounting by the executors, and at that time the amount of the trust fund was in their hands in bonds and mortgages, which were held by them as the trust fund, and no part thereof was ever paid to the residuary legatees. Neither T. nor plaintiff were cited to appear upon the accounting. By the surrogate's decree thereon, the executors were credited with the amount of the trust fund. *Held*, that in the absence of proof of any fraudulent conversion or combination on the part of the residuary legatees whereby the trust fund was affected or divested, no claim was established against them; that the trust fund having been invested and set apart as prescribed by the will, and the trust being in that condition at the time of the decree, the irregularity in not citing plaintiff and T. did not render the distribution of the residuary estate invalid; that plaintiff's interest was simply in the trust fund, and he had no concern in the distribution of the residue; that for any breach of duty upon the part of the executors and trustees his remedy was against them, not against the distributees. *Mills v. Smith*. 256

6. Where an executor and executrix who were legatees under the will executed an instrument stating that their accounts were settled "as between themselves, and as between themselves and said estate," and mutually releasing each other from every liability "by reason of anything relating to the estate or the doings or proceedings of either of them as executrix or executor of said will," *held*, that the release was a bar to proceedings instituted by the executor before the surrogate to compel the executrix to account. Also, that the effect of the instrument as a bar was not affected by the fact that there was an infant interested in the estate; that the release, while it stands, was effectual as a bar under all circumstances as between the executor and executrix. *In re Pruyn*. 544

— *As to sufficiency of evidence to sustain decision of Surrogate's Court on settlement of executors' account.*

See In re Bolton (Mem.). 554

— *As to sufficiency of evidence to sustain judgment discharging sureties on administrators' bond.*

See Altman v. Wile (Mem.). 574

FALSE IMPRISONMENT.

Plaintiff was arrested by virtue of a warrant issued by the recorder of the city of Amsterdam, upon information sworn to by defendant, based upon the provision of the Code of Criminal Procedure (§ 84) authorizing an information to be laid before a magistrate that a person has threatened to commit a crime against "the person or property of another." The information charged that plaintiff threatened to commit the crime of injuring property of a corporation named (Penal Code, §§ 639, 654), in that he threatened to tear down a wall then being erected thereon, and there was just reason to fear that he would tear down and demolish it. The warrant recited the facts substantially as stated in the information; neither alleged any unlawful or criminal intent. In an action for false imprisonment it appeared that defendant asked that the warrant be issued; he received and delivered it to the chief of police with a request that it be served "right away." After the arrest plaintiff was taken to the recorder's office, and thereafter, on motion of his counsel, the proceeding was dismissed. *Held*, that the recorder acquired no jurisdiction, and so the warrant and all proceedings under it were absolutely void; and that defendant was liable. *Hewitt v. Neuburger*. 538

FISH AND FISHERIES.

1. Under the provisions of the act for the preservation of fish and game (§§ 238, 240, chap. 488, Laws of 1892), as amended in 1893 (Chap. 573, Laws of 1893), fines as well as penalties for violations of the act are required to be paid over to the board of commissioners of fish-

ing corporation to set aside a transfer of property to defendant, made by the corporation in contemplation of insolvency, and so in violation of the statute (1 R. S. 603, § 4), and to compel payment of its value, the answer set up as a defense that subsequent to the transfer and before the appointment of plaintiff as receiver, third parties, under a judgment and execution against the corporation, sold the property as the property of the corporation, and so that plaintiff took no interest therein. It appeared that the amount bid on the execution sale was one dollar, and such sale was made for that sum. *Held*, that a finding was justified that the sale was made subject to the transfer. *Stonebridge v. Perkins.* 1

2. As to whether, even if a valid sale of the property upon execution had been shown, it would have constituted a defense in the absence of allegations connecting defendants with the title so obtained, *quære.* *Id.*

3. In an action to recover rent due under a lease of premises in the city of New York the defense was an eviction. The only act of the lessors upon which the defense was attempted to be supported was the giving to contractors for an excavation upon an adjoining lot a permit to enter on the premises, as required by the Consolidation Act (§ 474, chap. 410, Laws of 1882), in order to subject the party making the excavation to the obligation of protecting the building on the leased premises from injury. *Held*, that in the absence of any reservation in the lease of a right to enter for such a purpose, the permit of the lessors alone was insufficient to give a right of entry to the licensees, but the consent of the lessees was also necessary, and so, if the contractors entered without defendant's consent, for their trespass plaintiffs were not responsible, and the defense was not established. *McKenzie v. Hatton.* 6

4. In an action against executors to recover the value of services alleged to have been rendered the deceased, *held*, that defendants,

under a plea of payment, were entitled to prove an agreement between plaintiff and the testator that certain devises and bequests to the former in the will of the latter should be in full payment and discharge of any claim for such services, save in case the will failed to be admitted to probate; and that as the claim was unliquidated and of a character that could be legally discharged by such an agreement, and it having been performed by decedent, and the provision made for him in the will accepted by plaintiff, a complete defense to the action was established. *McLaughlin v. Webster.* 76

DEMAND.

The duty rests upon a party receiving money for the use of another to pay it over as soon as received, or, at least, within a reasonable time, and an action is maintainable by the latter to recover the same without demand. *Wood v. Young.* 211

DEMURRER.

See PLEADING.

DEVISE.

The will of S. gave the use and income of his real estate, one-half to P., the other half to I., during life, but in either case not to exceed twenty years from the testator's death. In case I. died before the expiration of the twenty years the "use and income" of his half, was given "to the eldest male issue * * * then surviving" of T. and A. In case I. survived the twenty years the whole of the real estate was given to him on condition that he pay certain legacies; if he died before the expiration of the twenty years the real estate was devised to "the eldest male issue" of T. and A. upon the same condition and subject to the interest given to P. His residuary estate the testator gave to his executors upon certain trusts and upon the expiration thereof to beneficiaries named. P. died three years after the tes-

tator. I. died thereafter and within the twenty years; at his death T. and A. had no issue living, but thereafter a son was born to them. In an action for the construction of the will, *held*, that as T. and A. had no male issue living at the time of death of I., the devise to their "eldest male issue" lapsed, and the real estate went, not to the heirs of the testator, but into the residuary estate and passed under the residuary clause. *Smith v. Smith.* 29

DIVORCE.

1. In an action for a limited divorce brought by the wife on the ground of alleged cruel and inhuman treatment, defendant in his answer denied the charges of the complaint, set up by way of counterclaim adultery on the part of plaintiff, and asked a judgment of absolute divorce. On the trial plaintiff, before resting, called the person with whom, in the answer, plaintiff was alleged to have committed adultery, who denied the same. On cross-examination he was asked and permitted to answer, under objection and exception, if he did not, at a time and place specified, admit to a person named that his relations with plaintiff were illicit; this he denied. The person named was thereafter called as a witness by defendant, and was permitted to testify that the alleged co-respondent did make the admission. *Held*, no error. *Woodrick v. Woodrick.* 457

2. Plaintiff set up in her complaint that defendant forbade her from visiting her parents. Defendant alleged that the reason plaintiff did not visit her mother was because they had a falling out. Defendant was permitted to testify, under objection and exception, to certain alleged communications of plaintiff's mother to him as to plaintiff's conduct with other men, which he testified he communicated to plaintiff. *Held*, that the evidence was competent. *Id.*

3. Defendant offered and was permitted to give in evidence certain

salacious verses alleged to be in plaintiff's handwriting, and to have been found in her writing desk. *Held*, no error. *Id.*

4. Defendant, a sea captain, on return from a voyage, was met by a person who informed him of certain incriminating evidence against his wife. Defendant was permitted to testify that he proceeded at once to his house and informed plaintiff of the incident, and was permitted to testify to the interview in detail. This was objected to as incompetent under the provision of the Code of Civil Procedure (§ 881) declaring a husband or wife to be incompetent to testify against the other on trial of an action founded on an allegation of adultery, except to prove marriage or disprove the allegation of adultery. It was admitted as competent evidence on the issue as to cruel and inhuman treatment, the court stating to the jury that it was not admitted on the question of adultery. *Held*, no error. *Id.*

EJECTMENT.

1. After judgment in an action of ejectment an order was granted under the Code of Civil Procedure (§ 1525), setting aside the judgment and granting a new trial. Subsequently, on motion of defendant, an order was granted setting aside said prior order, amending and modifying the judgment and execution, with leave to apply again for leave to vacate the amended judgment for the purposes of a new trial, but refusing to set aside the execution, under which plaintiff had been put in possession. On appeal from the order, *held*, that it was one addressed to the discretion of the court below and so was not reviewable here. (Code Civ. Pro. § 190.) *De Lancey v. Piegras.* 88
2. After defendant had secured the amendment to the judgment and execution he again resumed possession of the premises and excluded plaintiff therefrom by force. Upon application of the

latter, defendant was ordered forthwith to restore such possession, and thereafter to desist from any physical resistance or interference with plaintiff's possession. *Held*, that the making of the order was within the power of the court; that plaintiff was not required to resort to some new and independent action or proceeding to regain possession. *Id.*

3. Where in an action of ejectment plaintiffs claimed title under deeds given under a judgment in a partition suit, to which defendants were not parties and had no connection therewith, *held*, that in order to sustain the action, and in the absence of any proof of possession of the land by the parties to the partition suit or their predecessors in interest, plaintiff was bound to show a subsequent possession prior to the possession of defendant; also that mere payment of taxes, claim of title and assertions of ownership, even when made upon the land, did not show the actual possession which raises the presumption of title sufficient to maintain ejectment. *Greenleaf v. B., F. & C. I. R. Co.* 395

4. Also *held*, that admissions to the effect that plaintiffs owned the land, made by one from whom defendants took a deed, when neither he nor plaintiffs were in possession, did not bind the defendants who subsequently took possession claiming to be the owners, and who relied upon their possession as sufficient evidence of ownership as against plaintiffs. *Id.*

ELECTION (OF REMEDIES).

—When the owner of stock pledged to secure indebtedness brought action to recover the amount due on sale of stock in ignorance that the sale was unlawful, and upon discovery of this fact was permitted to amend his complaint so as to make the action one for conversion, *held*, that the bringing of the action in its original form was not an election to ratify the illegal sale.

See Smith v. Savin.

315

ELECTION (OF OFFICERS).

1. A school commissioner is a constitutional officer "elected by the People," and so, under the State Constitution prescribing the qualification of voters (Art. 2, § 1), may only be voted for by "male citizens." *In re Gage.* 112
2. Accordingly *held*, that the act of 1892 (Chap. 214, Laws of 1892), conferring upon women the right to vote for school commissioners, is unconstitutional. *Id.*

EMINENT DOMAIN.

1. In 1835 the commissioners appointed under the act of that year to lay out streets, etc., in the city of Brooklyn (Chap. 132, Laws of 1835) made and filed a map showing a street passing over lands owned by H. The street was never actually opened or regulated. In 1851 H. conveyed the adjoining lands by deed which contained a reservation of his title and interest in the land forming the street. In 1864 the department of assessment of the city made and filed a map including said lands in which the street appeared substantially as in the map of 1835, and since then no assessment has been made or tax levied upon the land of H. included in said street. In 1879 the executors of H. filed a map of his lands, laid out in streets, blocks and lots, corresponding with the commissioners' map, with a notice, however, indorsed thereon to the effect that it was not intended to dedicate any of the lands lying within the lines of the streets to public use; afterwards said executors conveyed lots, bounding them upon said streets, and including the land within the street lines in front of the lots conveyed. In proceedings instituted by the municipal authorities to acquire title for street purposes to the lands within the lines of said street as so laid out, *held*, that H. and his executors, as between themselves and their grantees, devoted the lands to use as a street, and the latter acquired an easement therein for that purpose; that the executors were only entitled to an award

for the value of the public easement, deducting therefrom the value of the private easement, and as the added burden was merely technical and nominal, they were only entitled to nominal damages. *In re Adams*. 297

2. Where in proceedings under the General Railroad Act (Chap. 140, Laws of 1850, as amended) to condemn lands for railroad purposes, an award of commissioners is reversed and a new appraisal directed, and upon a second hearing a new award is made, the second report "is final and conclusive on all the parties interested" (§ 18 of said act, as amended by chap. 198, Laws of 1876), and no appeal lies to this court from an order of General Term affirming an order of Special Term confirming the second report. *In re S. & B. R. R. Co.* 532

EQUITY.

1. While a party to a written instrument may not invoke the aid of a court of equity because of a mistake of law on his part, where there is no improper conduct on the part of the other party, where the mistake on his part is shown, and also either positive fraud or inequitable, unfair and deceptive conduct on the other side, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. *Haviland v. Willets*. 35

2. In an action instituted in 1889 to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interest of her co-tenants, who also assigned to her their rights of action and claims for damages. Plaintiff claimed for damages sustained prior to March, 1887, as well as since. On the trial defendants moved that the action be severed and that the claim for damages acquired by assignment be sent to a jury; this

was denied. *Held*, no error; that if the court decided that the claim for equitable relief was well founded, it was within its discretion to assess all the damages sustained to which plaintiff was entitled, whether belonging to her as owner or acquired by assignment, and that defendants had no absolute right to have them determined by a jury. *Hunter v. Manhattan R. Co.* 281

3. Equity may interfere to prevent a threatened cloud on title where there appears to be a determination to create such a cloud, and the danger is not merely speculative or potential. *King v. Townshend*. 358

— *When lessor entitled to aid of court of equity to restrain violation by lessee of condition in lease.*
See R. L. Association v. Kellogg. 348

ESTOPPEL.

Notice to a purchaser, when he took a conveyance, that another claimed title under a sale, upon execution issued on a void judgment, does not operate as an estoppel against the former. *McCracken v. Flanagan*. 174

— *When party estopped because of delay from recovering of executors moneys paid out unlawfully, but in good faith.*
See Haviland v. Willets. 35

EVIDENCE.

1. Plaintiffs obtained an attachment against a corporation, which was placed in the hands of defendant, as sheriff, who, by virtue thereof, levied upon certain property of the corporation. A. claimed the property and pursuant to an agreement between him, a clerk of one of defendant's deputies and plaintiff's attorney, A. gave a check as security for any judgment plaintiffs might recover, and thereupon the property was delivered up to him, and defendant drew the money on the check. A. commenced an action to recover the same, claiming that the prop-

- erty belonged to him and that the check simply took its place; he recovered judgment, which was paid by defendant. Plaintiffs were not made parties; they obtained judgment in the attachment suit, and having failed to collect, brought this action to recover the amount of the judgment. Plaintiffs put in evidence a copy of an affidavit claimed to have been made by defendant; the original was presented in court and used by his attorney in the action of A. against him as an original, genuine paper. It was objected that there was no proof that defendant signed the original. *Held*, untenable. *Blair v. Flack*. 53
2. The judgment roll in the action of A. against defendant was offered in evidence in his behalf, but was excluded. *Held*, no error; that as plaintiffs were not parties to that action they were not bound by the judgment; also, as defendant had the benefit of the proof that he claimed and recovered in that action the proceeds of the check, the judgment roll was immaterial. *Id.*
 3. In an action by a stock broker to recover a balance alleged to be due from a customer, defendant, on cross-examination of plaintiff, for the purpose of discrediting the alleged purchases, sought to follow through plaintiff's books, not only the transactions in question, but his dealings with other customers. The court allowed this, except as to the names of the other customers. *Held*, that the limitation was within the discretion of the court; that the discretion was reasonably exercised; and so, there was no error. *Gillett v. Whiting*. 71
 4. It was shown what books were kept by plaintiff. Defendant offered to prove by experts what books were usually kept by stock brokers; this was excluded. *Held*, no error. *Id.*
 5. On the trial of an action against executors to recover for services rendered, one of the executors, defendants, who was also a residuary legatee under the will, as a witness for the defense, testified to a conversation with decedent, in the presence of plaintiff. This was objected to as incompetent under the Code of Civil Procedure (§ 829). *Held*, untenable, as the Code simply excluded such testimony when sought to be given against, not when given, as here, in favor of the personal representatives of the deceased. *McLaughlin v. Webster*. 76
 6. P., defendant's testator, was a private banker in New York city; by circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Plaintiff employed P. to loan for him \$25,000, which the latter agreed to do gratuitously; he loaned the money, taking as collateral certain certificates of corporate stock, which had by a forgery been raised so as to represent a larger number of shares than they were issued for, and in consequence a loss resulted. In an action to recover damages defendant offered to show that P. lent \$50,000 of his own money, accepting as collateral similarly raised certificates; also that the certificates in question had been given and received on the street as collateral for loans, and deceived the skill of a great number of bankers and brokers who took and held them without suspicion. This testimony was objected to and excluded. *Held*, error, as the proof, if made, would have shown good faith on defendant's part and would have excused and justified the failure to discover the forgery. *Isham v. Post*. 100
 7. In an action for the conversion of certain machinery which had been used by plaintiff for several years before the alleged conversion, plaintiff was permitted to prove, under objection and exception, what the machinery cost when new. *Held*, no error; that the testimony was some evidence of value. *Hawcer v. Bell*. 140
 8. Declarations of a deceased person, made when he was in possession of real estate, in reference to his

title thereto, which were against his interest, may be given in evidence even in an action between third parties where the title comes in question. *Lyon v. Ricker*. 225

9. Plaintiff's complaint alleged that his father executed and delivered to defendant a warranty deed conveying certain premises then in the possession of the grantor to plaintiff, with instructions to deliver the same to the latter on the death of the grantor, and that defendant, upon demand made after such death, refused to deliver the same. Defendant's answer denied certain of the allegations of the complaint, but made no claim to the deed or any interest in it, simply stating that he "retains possession of the deed for the reason that he does not know to whom to deliver it or his duties in the premises." The only evidence as to the purpose of the delivery of the deed to defendant was testimony of declarations of the grantor after making the deed, and while in possession of the land, to the effect that he had made out the deed in question, and another deed to plaintiff's brother, and left them with defendant, to be given to the grantees on his (the grantor's) death. *Held*, that the evidence was competent; and so, that objections thereto were properly overruled. *Id.*

10. One of the witnesses to prove these declarations was said brother. *Held*, that the fact that he occupied the same position as plaintiff, while it might go to his credibility, did not render his testimony incompetent. *Id.*

11. The testimony of defendant as a witness in his own behalf, as to what took place between him and the grantor was offered and rejected. *Held*, no error (Code Civ. Pro. § 829); that the testimony was not made competent by the fact that the declarations of the grantor made at other times had been received on behalf of plaintiff. *Id.*

12. In an action against an elevated railroad company to recover damages caused by the operation of its

road in front of plaintiff's premises expert evidence is admissible to show the general effects caused by the maintenance and operation of the road upon abutting and neighboring properties. *Hunter v. Manhattan R. Co.* 281

13. In an action to redeem lands sold upon foreclosure of a mortgage by advertisement, it appeared that the attorney who foreclosed the mortgage for D., the mortgagee, was dead at the time of the trial. Plaintiff offered to prove that said attorney told the mortgagor that the foreclosure would make no difference as to the agreement between him and D. This was objected to and excluded. *Held*, no error. *Lewis v. Duane*. 302

14. Under a general denial in an action on contract, defendant may controvert by evidence anything which plaintiff is bound to prove in the first instance to make out his cause of action, and anything he is permitted to prove for that purpose. *Milbank v. Jones*. 340

15. Plaintiff's complaint alleged in substance the receipt by defendant of \$5,000 to be held in trust for plaintiff, the trust to be terminated at the election of the latter on or after a day specified; that after that day plaintiff notified defendant of his election to terminate the trust and demanded the money, which defendant refused to pay. The answer was a general denial. Upon the trial plaintiff was permitted to prove an agreement by which defendant acknowledged receipt of the sum specified, which he agreed to return to plaintiff in case a certain resolution of the common council of New York city should not pass and take effect before a day specified. Defendant offered to prove that plaintiff, subsequent to the making of the agreement, extended the time for the passage of the resolution; that it was passed and went into effect on the day specified; that defendant delivered to plaintiff a certified copy thereof, and that the latter accepted it as performance. This was objected to and excluded. *Held*, error. *Id.*

16. In proceedings for the probate of a will which is contested on the ground that there was no due publication of the will, a beneficiary under it is incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication. What occurred at that time is a transaction between the testator and the witness within the meaning of the Code of Civil Procedure (§ 829), although the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witnesses. *In re Bernsee*. 389
17. Plaintiff through a broker sold to defendant certain parcels of canary seed described in the broker's note as to each parcel as "March steamer shipment from Turkey," the name of the steamer being given. After stating the price and that the seed was to be paid for within a time specified "from date of delivery on dock in New York," each note contained this clause: "Goods to be taken from dock on arrival of steamer when ready for delivery." The parcels were shipped by the steamer named to Liverpool, and there transhipped to another steamer which brought them to New York, where they were tendered to defendants, who refused to accept solely on the ground that the seed was not brought by the steamer named direct to New York. On trial of an action to recover damages plaintiff offered to prove that at the time of sale there was not and never had been freight steamers sailing direct from Turkey to New York, and that the invariable custom was to carry goods to Liverpool, and there transfer them to a steamer for New York. This evidence was excluded. *Held*, error; that the broker's notes did not in explicit terms require a shipment direct in the same steamer from Turkey to New York; that while the steamer of shipment was identified that of arrival was not, and the language of the contract admitted of a doubt as to whether the intent was that both were to be the same, and to solve this doubt the evidence was proper. *Iasigi v. Rosenstein*. 414
18. In an action for a limited divorce brought by the wife on the ground of alleged cruel and inhuman treatment, defendant in his answer denied the charges of the complaint, set up by way of counterclaim adultery on the part of plaintiff, and asked a judgment of absolute divorce. On the trial plaintiff, before resting, called the person with whom, in the answer, plaintiff was alleged to have committed adultery, who denied the same. On cross-examination he was asked and permitted to answer, under objection and exception, if he did not, at a time and place specified, admit to a person named that his relations with plaintiff were illicit; this he denied. The person named was thereafter called as a witness by defendant, and was permitted to testify that the alleged co-respondent did make the admission. *Held*, no error. *Woodrick v. Woodrick*. 457
19. Plaintiff set up in her complaint that defendant forbade her from visiting her parents. Defendant alleged that the reason plaintiff did not visit her mother was because they had a falling out. Defendant was permitted to testify, under objection and exception, to certain alleged communications of plaintiff's mother to him as to plaintiff's conduct with other men, which he testified he communicated to plaintiff. *Held*, that the evidence was competent. *Id.*
20. Defendant offered and was permitted to give in evidence certain salacious verses alleged to be in plaintiff's handwriting, and to have been found in her writing desk. *Held*, no error. *Id.*
21. Defendant, a sea captain, on return from a voyage, was met by a person who informed him of certain incriminating evidence against his wife. Defendant was permitted to testify that he proceeded at once to his house and informed plaintiff of the incident, and was permitted to testify to the interview in detail. This was ob-

jected to as incompetent under the provision of the Code of Civil Procedure (§ 831) declaring a husband or wife to be incompetent to testify against the other on trial of an action founded on an allegation of adultery, except to prove marriage or disprove the allegation of adultery. It was admitted as competent evidence on the issue as to cruel and inhuman treatment, the court stating to the jury that it was not admitted on the question of adultery. *Held*, no error, *Id.*

22. T. & M., plaintiff's assignors, and defendant entered into a contract by the terms of which the former agreed to make a monument for the latter, who, the contract stated, "is to inspect the model when made in clay, and it is to be made to his entire satisfaction." In an action for an alleged breach of the contract, plaintiff gave evidence to the effect that defendant inspected the model when finished and expressed his entire satisfaction therewith. This was denied by defendant, who testified that, on the contrary, he expressed dissatisfaction, specifying various defects and objections. Plaintiff was permitted, against the objection of defendant, to read in evidence a letter from M. to defendant which, among other things, stated in substance that the model had been on exhibition in the studio of T. & M. for about a month, and that hundreds of visitors, professional and business men and women, unanimously commended it; this was followed by a statement of what various persons, who were named, had said upon the subject. *Held*, that the admission of the letter in evidence was error, requiring a reversal of the judgment. *Thomas v. Gage*, 506

EXCISE.

1. The Civil Damage Act of 1873 (Chap. 646, Laws of 1873) was not repealed by the provision of the act of 1892, "in relation to excise" (§ 2, chap. 403, Laws of 1892), providing for the recovery of damages caused by the sale of intoxicating liquors in case pre-

vious notice has been given forbidding the sale. The said provision and the one upon the same subject in the act of 1892, "to revise and consolidate the laws in relation to the sale of intoxicating liquors" (§ 40, chap. 401, Laws of 1892), are to be read as simply amendatory of the act of 1873, not as repealing it by implication. *Quinlan v. Welch*, 158

2. A cause of action, therefore, which accrued prior to said amendments was not affected thereby. *Id.*

EXECUTION.

1. In an action brought by the receiver of an insolvent manufacturing corporation to set aside a transfer of property to defendant, made by the corporation in contemplation of insolvency, and so in violation of the statute (1 R. S. 603, § 4), and to compel payment of its value, the answer set up as a defense that subsequent to the transfer and before the appointment of plaintiff as receiver, third parties, under a judgment and execution against the corporation, sold the property as the property of the corporation, and so that plaintiff took no interest therein. It appeared that the amount bid on the execution sale was one dollar, and such sale was made for that sum. *Held*, that a finding was justified that the sale was made subject to the transfer. *Stonebridge v. Perkins*, 1

2. It did not appear that the sheriff ever made an actual levy under the execution, and at the time the sale was made the property was not present or within the view of those attending the sale. *Held*, that no valid sale was established. *Id.*

3. A sale of personal property upon execution affords no protection to a party defending under it, unless he shows, *first*, a levy, *i. e.*, such an exercise of right and dominion by the officer over the property as would subject him to an action of trespass by the owner if the levy was not justified, and

- second*, a sale with the property actually present and within the view of the persons attending the sale. *Id.*
4. A sale of land on execution, issued upon a void judgment against the owner, in no way affects his title, and a subsequent conveyance by him is just as effectual as if the judgment had never in form been entered. *McCracken v. Flanagan.* 174
5. A purchaser on sale of land on execution, having paid the purchase price, and received the sheriff's certificate of sale, after obtaining the sheriff's deed is in the same position as if the deed had been executed by the judgment debtor when the judgment was docketed, and while holding the certificate he is to be regarded the same as if the debtor had at the time of docketing the judgment executed a contract of sale and received the full purchase price. *Maroney v. Boyle.* 462
6. Such a purchaser, therefore, is entitled to protection against an outstanding and unknown lien for purchase money in favor of a former grantor. *Id.*
- ### EXECUTORS AND ADMINISTRATORS.
1. The commissions of an executor, until ascertained and liquidated in the manner prescribed by law, are not subject to his disposal, but upon grounds of public policy are unassignable. *In re Worthington.* 9
2. Where, therefore, one claiming under an assignment of his commissions, executed by an executor before settlement of his accounts, appealed from an order of the General Term affirming an order of the surrogate denying a motion made by said assignee to open and modify his decree, made on settlement of the accounts of the executors, which decree refused commissions to the assignee, *held*, that the appellant had no interest authorizing him to make the motion or bring the appeal. *Id.*
3. By the will of S. he gave his residuary estate to his wife, "to be used and enjoyed by her" during life or as long as she should remain his widow, and at her death or re-marriage then the same to be equally divided between other persons named in the will; the same to be "received and accepted" by her in lieu of dower. The testator left personal estate only, which was converted into money. The executor died and an administrator with the will annexed was appointed, who incurred some expense as such. Upon settlement of the executor's accounts the surrogate decreed that the whole fund should be paid over by the administrator of the executor directly to the widow, who was then a resident of another state, and that she was entitled to the possession thereof without giving security. *Held*, error; that the administrator with the will annexed was entitled to have the money paid over to him, and if he had made any disbursements, or incurred any obligations properly chargeable to the estate, he was entitled to an opportunity of proving this and to a decree for their payment; also, that the will simply gave to the widow an estate for life or during widowhood, and upon the happening of either event the remaindermen were entitled to the whole *corpus* of the estate; that as the property was not of a kind which must be individually possessed in order to be enjoyed, she was not entitled to possession without giving security. *In re McDougall.* 21
4. An award of costs against an executor or administrator, without a certificate of the trial judge showing the facts upon which such an award must be based is error. (Code Civ. Pro. §§ 1835, 1836.) *Matson v. Abbey.* 179
5. By the will of M. a sum was given to his executors to be held in trust for the benefit of T. during life, the trust fund to be invested in bonds and mortgages, and upon his death to be distributed among his children. In an action by the sole surviving child of T., brought after his death, to

compel the residuary legatees to account, and to pay the amount of the trust fund, it appeared that there had been a final accounting by the executors, and at that time the amount of the trust fund was in their hands in bonds and mortgages, which were held by them as the trust fund, and no part thereof was ever paid to the residuary legatees. Neither T. nor plaintiff were cited to appear upon the accounting. By the surrogate's decree thereon, the executors were credited with the amount of the trust fund. *Held*, that in the absence of proof of any fraudulent conversion or combination on the part of the residuary legatees whereby the trust fund was affected or divested, no claim was established against them; that the trust fund having been invested and set apart as prescribed by the will, and the trust being in that condition at the time of the decree, the irregularity in not citing plaintiff and T. did not render the distribution of the residuary estate invalid; that plaintiff's interest was simply in the trust fund, and he had no concern in the distribution of the residue; that for any breach of duty upon the part of the executors and trustees his remedy was against them, not against the distributees. *Mills v. Smith*. 256

6. Where an executor and executrix who were legatees under the will executed an instrument stating that their accounts were settled "as between themselves, and as between themselves and said estate," and mutually releasing each other from every liability "by reason of anything relating to the estate or the doings or proceedings of either of them as executrix or executor of said will," *held*, that the release was a bar to proceedings instituted by the executor before the surrogate to compel the executrix to account. Also, that the effect of the instrument as a bar was not affected by the fact that there was an infant interested in the estate; that the release, while it stands, was effectual as a bar under all circumstances as between the executor and executrix. *In re Pruyn*. 544

— *As to sufficiency of evidence to sustain decision of Surrogate's Court on settlement of executors' account.*
See In re Bolton (Mem.). 554

— *As to sufficiency of evidence to sustain judgment discharging sureties on administrators' bond.*
See Altman v. Wile (Mem.). 574

FALSE IMPRISONMENT.

Plaintiff was arrested by virtue of a warrant issued by the recorder of the city of Amsterdam, upon information sworn to by defendant, based upon the provision of the Code of Criminal Procedure (§ 84) authorizing an information to be laid before a magistrate that a person has threatened to commit a crime against "the person or property of another." The information charged that plaintiff threatened to commit the crime of injuring property of a corporation named (Penal Code, §§ 639, 654), in that he threatened to tear down a wall then being erected thereon, and there was just reason to fear that he would tear down and demolish it. The warrant recited the facts substantially as stated in the information; neither alleged any unlawful or criminal intent. In an action for false imprisonment it appeared that defendant asked that the warrant be issued; he received and delivered it to the chief of police with a request that it be served "right away." After the arrest plaintiff was taken to the recorder's office, and thereafter, on motion of his counsel, the proceeding was dismissed. *Held*, that the recorder acquired no jurisdiction, and so the warrant and all proceedings under it were absolutely void; and that defendant was liable. *Hewitt v. Newburger*. 538

FISH AND FISHERIES.

1. Under the provisions of the act for the preservation of fish and game (§§ 238, 240, chap. 488, Laws of 1892), as amended in 1893 (Chap. 573, Laws of 1893), fines as well as penalties for violations of the act are required to be paid over to the board of commissioners of fish-

eries, not to the county treasurer.
People ex rel. v. Crennan. 239

2. The amendment has a retroactive effect, and as such is constitutional. The moneys collected are in no sense the private property of the county, and hence it is not deprived of private property by the amendment. *Id.*
3. A mandamus, however, may not be issued on the relation of said board to compel a justice of the peace to pay over fines collected by him, as the relator has an adequate remedy at law, and that is the remedy provided by the statute. *Id.*

FORECLOSURE.

1. A mortgage given to secure the payment of commercial paper or judgments up to a certain fixed amount is not given to secure unliquidated damages, and it may be foreclosed by advertisement. *Lewis v. Duane.* 302
2. Where such a mortgage is so foreclosed, and proper notices of sale are served, which disclose the amount claimed to be due thereon, and the mortgagor stands by silently and with approval, making no complaint as to the amount asserted to be due until long after the sale, in the absence of any claim of fraud this court will be slow to criticise or dispute that amount. *Id.*
3. An attorney employed to foreclose a mortgage has no implied authority to compromise the rights of his client and make nugatory the duty he was employed to perform. *Id.*
4. In June, 1873, L. executed to D. a mortgage as security for the payment of the sum of \$60,000, which sum, by the terms of the mortgage, was to be paid one year from date. An agreement was executed by D. at the same time stating the intent of the mortgage to be to secure him against liability as indorser for L., the amount of which was stated to be unknown, but supposed to be about \$32,000; also to secure advances to satisfy judgments which were a lien upon the lands mortgaged, D. agreeing to take care of and protect L. and his property from the enforcement of any of said judgments. During the year D. paid out large sums of money under the agreement; a year thereafter he foreclosed the mortgage by advertisement. The foreclosure was conducted in accordance with the statute. The notice, which stated the amount claimed to be due on the mortgage, was duly served on L. In an action brought in September, 1883, against the executrix of D. for an accounting and to redeem the lands sold under the mortgage, it appeared that at the time of the foreclosure D. had paid out under the agreement over \$42,000, and that there remained outstanding judgments which were liens on the premises to the amount of \$20,000; also that there was indorsed paper outstanding, the whole amounting to much more than the sum secured. It was claimed by plaintiff that the foreclosure was premature because D. had not paid off all of the judgments. *Held*, untenable; that the agreement did not alter or change the maturity of the mortgage, and while D. became bound for the eventual payment of the judgments, he had the right, after the expiration of the year, to resort to the property itself for the means of carrying out the contract, he being bound in the meantime only to pay judgments when necessary to prevent a sacrifice of the property or an enforcement against L. personally. *Id.*
5. Also, *held*, that the mortgage was properly foreclosed by advertisement; that it was not given to secure unliquidated damages, as the indorsed paper and judgments were for settled and fixed amounts, and all that was necessary to ascertain the sum for which the mortgage stood as security was to add them together. *Id.*
6. It was claimed that the papers executed constituted a trust. *Held*, untenable; that the relations of the parties were simply those of mortgagor and mortgagee. *Id.*

7. It appeared that D. in some cases when he paid judgments did not have them discharged of record, but caused them to be transferred to his wife, who was a sister of L.; this was done with the assent of the latter. *Held*, that as none of the property of L. was wasted or sacrificed on execution sales, the agreement of D. was fully performed; that the mode of protecting L. resorted to was within the scope of the agreement. *Id.*
8. The attorney who foreclosed the mortgage for D. was dead at the time of the trial. Plaintiff offered to prove that said attorney told L. that the foreclosure would make no difference as to the agreement between him and D. This was objected to and excluded. *Held*, no error. *Id.*

FOREIGN CORPORATIONS.

1. Foreign corporations are included within the terms of the act of 1855 (Chap. 37, Laws of 1855) subjecting non-residents doing business in this state to assessment and taxation on all sums invested in such business. *People ex rel. v. Barker.* 118
2. Stocks of foreign corporations, held by an executor as such, are to be regarded as part of the estate, and so the right of succession thereto is subject to payment of the tax imposed by the Collateral Inheritance Act of 1892 (§ 1, chap. 399, Laws of 1892). *In re Merriam.* 479

FORMER ADJUDICATION.

1. In an action to remove a cloud on title it appeared in a prior action of ejectment brought by one then holding the record title against defendant T., while he was in possession, a judgment was rendered in his favor. In that action the plaintiff proved no possession, either in himself or any of his grantees, and the defendant neither pleaded nor proved a title, but relied on his possession. *Held*, that the judgment was not conclusive against

the title now held by plaintiff, as it did not establish a title in any one, and did not destroy or affect a title subsequently made perfect by possession. *King v. Tononahend.* 358

2. Where a party has been defeated in his action by reason of neglect to perform some preliminary act necessary to perfect the cause of action, such as giving a notice, the judgment is not a bar to another action begun after the performance of the requisite preliminary act. *Rose v. Hawley.* 366
3. In an action to compel specific performance of such a contract these facts were found in substance: During the lifetime of J., plaintiff's husband, who was defendant's son, defendant purchased the premises in question as a home for J., with the promise that he would convey the same to J. or some one of his family without the payment of anything therefor. Relying upon this agreement, J. made and paid for permanent improvements to the amount of \$2,800, with defendant's knowledge. After the death of J. defendant agreed that if plaintiff would pay certain notes of J., on which defendant was liable as indorser, he would give her a lease of the premises for life, or pay what J. "had put in the place." In reliance upon this agreement plaintiff paid said notes, and in so doing paid more than she was obliged to pay as executrix of her husband's will. The case was twice tried. Upon the first trial the jury, to whom was submitted the questions of fact, answered in the negative the questions as to the promise of defendant to J., and as to improvements made by the latter. These findings were adopted by the court, and were not disturbed by the reversal of the judgment upon appeal. Defendant objected to the submission of said questions to the jury on the second trial and to all evidence in reference thereto. *Held*, that the verdict of the jury answering these questions in the affirmative on the second trial and the findings objected to were entirely harmless

as no relief was based thereon, and they in no way entered into or affected the judgment; also, that as by the reversal the whole case was thrown open for trial of the issue as to the agreement with plaintiff, the circumstances attending the original purchase, possession and improvements made by the son were properly put in evidence. *Dunkel v. Dunkel*. 427

4. Where a surviving partner has misappropriated the firm assets and an equitable action has been brought against him by the personal representatives of the estate of the deceased partner, and a judgment obtained therein for an accounting and payment of the amount found due the estate, this, unless the amount so found due is paid, is not a bar to an action against others who, by intermeddling with the assets and sharing in the misappropriation, have rendered themselves liable therefor as trustees *de son tort*. Until satisfaction of the judgment it gives the surviving partner no greater rights over the assets than he had before its rendition. *Russell v. McCull*. 437

5. Each one of the several wrongdoers is severally liable for the full amount of the misappropriation. *Id.*

6. Where, therefore, after judgment against the surviving partner alone, a joint action was brought against him and other wrongdoers who had participated in the misappropriation of the firm assets, *held*, that the former judgment was a bar as to him, but was no defense as to those not previously sued. *Id.*

7. In the subsequent action it was decided that the judgment against the surviving partner was conclusive against the plaintiff as to the amount and value of the assets, but was no evidence against the defendants other than said partner. *Held*, no error. *Id.*

8. In the action against the surviving partner it appeared that there was a disputed claim against the firm in favor of one who had shared in the

misappropriation of the firm assets, and the amount thereof was required to be deposited in a trust company, to pay such claim if it was established, but no such deposit was in fact made. *Held*, in the subsequent action against the other wrongdoers, that no one of the defendants was entitled to be credited with the amount so ordered to be deposited; that the fact that one of the defendants claimed to be a creditor of the old firm was not a defense, as he could not, by his illegal interference with the assets, pay his claim, nor had he the right to take possession of the property for that purpose. *Id.*

9. Where the law of a case has been determined after full argument and consideration by the Second Division of this court, and upon a second appeal substantially the same facts appear, not changed in any material respect the questions of law will not be considered, but the parties will be held as concluded by the former decision; at least where the case affects no general public interest, and the decision so made establishes no doctrine in hostility to the previous law as declared by this court, and this, *it seems*, although if the case was *res novus*, the court might be of the opinion that the law of the case was erroneously adjudged. *Cluff v. Day*. 580

FRAUD.

1. While a party to a written instrument may not invoke the aid of a court of equity because of a mistake of law on his part, where there is no improper conduct on the part of the other party, where the mistake on his part is shown, and also either positive fraud or inequitable, unfair and deceptive conduct on the other side, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. *Harcland v. Willets*. 35
2. H. died leaving the plaintiff his sole heir and next of kin him surviving, and leaving a will by which he gave a legacy to plaintiff, and his residuary estate to two persons named, one-half to each. One of

these died before the testator, leaving two children; the other was executor under the will and the sole surviving executor. Plaintiff was, at the testator's death, seventy-three years of age. Both he and the executor believed at the time of the reading of the will that the share of the residuary legatee who had died went to his children. The executor then proposed to give plaintiff a sum specified, he to release all his interest in the estate. Before, however, an agreement was perfected, the former discovered that such legacy had lapsed and that the share went to plaintiff. Without disclosing this the executor drew up an agreement of release which contained no statement of the facts; this plaintiff signed. Subsequently the executor took plaintiff to his counsel, and there plaintiff executed a more formal instrument, which recited the death of said residuary legatee and the desire and intention of plaintiff to relinquish to the children of the deceased legatee all the rights and interests acquired by him as heir at law and next of kin, and by which, in consideration of payment of the sum agreed upon, he released and discharged such interests and authorized payment thereof to said children. In an action to set aside said release it appeared that it was read at the time it was executed, and that the counsel stated, after the release was signed, that by the lapse of the legacy, the ownership thereof vested in plaintiff; this statement was couched in legal terms, and plaintiff testified that he did not hear the statement either of counsel or as read. *Held*, that a question of fact was presented, and this court could not dispute a finding that plaintiff did not know his legal rights when he executed the release; and that, as the evidence showed a studious concealment from plaintiff by the executor, in whose position and ability the former reposed some confidence, of the precise point essential to his free and intelligent action, it was competent for a court of equity to cancel the release, so far as lawful payments had not been made under it. *Id.*

— *When evidence insufficient to authorize judgment in action to recover damages for alleged fraud.*
See Kelly v. Gould (Mem.). 596

GAME.

Under the provisions of the act for the preservation of fish and game (§§ 238, 240, chap. 488, Laws of 1892), as amended in 1893 (Chap. 573, Laws of 1893), fines as well as penalties for violations of the act are required to be paid over to the board of commissioners of fisheries, not to the county treasurer. *People ex rel. v. Crennan.* 239

2. The amendment has a retroactive effect, and as such is constitutional. The moneys collected are in no sense the private property of the county and hence it is not deprived of private property by the amendment. *Id.*
3. A mandamus, however, may not be issued on the relation of said board to compel a justice of the peace to pay over fines collected by him, as the relator has an adequate remedy at law, and that is the remedy provided by the statute. *Id.*

GIFT.

1. An executory promise to pay a sum of money, made without consideration, and intended to operate as a gift after the death of the promisor, is invalid, and cannot be enforced. *Holmes v. Roper.* 64
2. M. procured a policy of insurance for \$2,000 upon the life of his son, payable to himself, his executors or assigns; he died leaving a will by which he gave all his estate to his executors in trust during the life of his widow, the principal then to be divided among his children. The son died in 1866 and the policy was collected by the executors of the father's will. In 1869 the children and devisees of said testator executed an instrument under seal, by which they assigned all their interest in the moneys collected on the policy to plaintiffs, the widow and children

of the son. The widow died in June, 1891. In July thereafter defendant was appointed the administratrix with the will annexed of M. In an action to recover the amount of the policy, it appeared that defendant as such administratrix received of the personal estate over \$8,000, and that there were no debts. Plaintiffs' claim was presented to defendant and payment thereof refused. This action was brought in November, 1891. *Held*, that the delivery of the assignment constituted a valid irrevocable gift of the fund realized upon the policy and vested title in the donees, subject to the life interest in the widow. *Matson v. Abbey*. 179

GRANTOR AND GRANTEE.

1. Where a grantor of land seeks to re-enter because of a breach of a condition subsequent, he must show that the true spirit and purpose of the condition have been willfully disregarded by the grantee; it is not sufficient to prove a technical breach, through the action of strangers, without the grantee's permission. *Rose v. Hawley*. 366
2. A grantor of land does not waive his equitable lien for unpaid purchase money by taking the promissory note of the grantee therefor, although in taking it he relies upon the solvency and financial ability of the grantee to pay the note, and does not have in contemplation the enforcement of the lien: he retains it, unless he expressly and consciously relinquishes it. *Maroney v. Boyle*. 462
3. The lien is valid against one who takes a conveyance from the grantee with knowledge of the existence of the claim for the unpaid purchase money. *Id.*
4. This equitable lien, however, will not prevail against one without notice thereof, who takes an incumbrance on the land, an interest therein or a conveyance thereof, in good faith and for a valuable consideration. *Id.*

5. Where, therefore, in an action by a grantor to enforce a lien for unpaid purchase money, it appeared that defendant D. purchased the land on sale under an execution against one who at the time of the rendition of the judgments held the record title under a deed from plaintiffs' grantee; that D. purchased in good faith without notice of plaintiffs' lien, and paid the purchase price in full; that at the time of the commencement of the action he held the sheriff's certificate of sale and thereafter received the sheriff's deed, *held*, that the lien was not enforceable; also, that the rights of D. were not affected by the fact that the purchase price paid by him was small. *Id.*

See DEED.

HIGHWAYS.

1. In 1835 the commissioners appointed under the act of that year to lay out streets, etc., in the city of Brooklyn (Chap. 132, Laws of 1835) made and filed a map showing a street passing over lands owned by H. The street was never actually opened or regulated. In 1851 H. conveyed the adjoining lands by deed which contained a reservation of his title and interest in the land forming the street. In 1864 the department of assessment of the city made and filed a map including said lands in which the street appeared substantially as in the map of 1835, and since then no assessment has been made or tax levied upon the land of H. included in said street. In 1879 the executors of H. filed a map of his lands, laid out in streets, blocks and lots, corresponding with the commissioners' map, with a notice, however, indorsed thereon to the effect that it was not intended to dedicate any of the lands lying within the lines of the streets to public use; afterwards said executors conveyed lots, bounding them upon said streets, and including the land within the street lines in front of the lots conveyed. In proceedings instituted by the municipal authorities to acquire

title for street purposes to the lands within the lines of said street as so laid out, *held*, that H. and his executors, as between themselves and their grantees, devoted the lands to use as a street, and the latter acquired an easement therein for that purpose; that the executors were only entitled to an award for the value of the public easement, deducting therefrom the value of the private easement, and as the added burden was merely technical and nominal, they were only entitled to nominal damages. *In re Adams*. 297

2. *It seems*, the authorities of a city cannot legalize an obstruction of a city street so as to bar the public right, and a building projecting into a street, although originally built with the consent of the city, is an unlawful obstruction and a public nuisance, and the user, although long continued, is no obstacle to proceedings for its removal. *People ex rel. v. Maher*. 330

3. Under the provision of the charter of the city of Albany (§ 11, tit. 13, chap. 298, Laws of 1883), as amended in 1888 (Chap. 398, Laws of 1888), requiring the city engineer, where a building projects into the street, "upon the receipt of written directions from the mayor," to take summary proceedings for the removal thereof, a discretion is given to the mayor to determine in any given case whether or not such proceedings shall be instituted. *Id.*

4. Accordingly *held*, that the court had no power to compel the mayor by mandamus to initiate such proceedings by giving the prescribed notice to the engineer; and that the discretion of the mayor in this respect was not affected by a resolution of the common council requesting him to take proceedings for the removal of the obstruction. *Id.*

5. *It seems*, the common council, as commissioners of highways, might institute proceedings appertaining to their functions as such, for the removal of the obstruction. *Id.*

HOMICIDE.

See MURDER.

HUSBAND AND WIFE.

See DIVORCE.

INFANTS.

1. While it is the inalienable right of a child, even of immature age, to pursue a trade, it must be not only one that is lawful, but which the state or sovereign, as *pater patriæ*, recognizes as proper and safe. *People v. Eicer*. 129

2. The provision of the Penal Code (§ 292) declaring a person guilty of a misdemeanor who exhibits a female child under fourteen years of age, or who, having the care of such a child as parent, etc., consents to her employment or exhibition as "a dancer * * *," or in a theatrical exhibition, or in any * * * exhibition dangerous or injurious to the life, limb, health or morals of the child, "is not limited to exhibitions which offend against public morals or decency, or endanger life or limb, but applies to all public exhibitions or shows. *Id.*

3. Said provision is not violative of any right secured by the Constitution, but is within the police power of the legislature; it is for that body to determine as to whether any or all such exhibitions are prejudicial to the interests of the child and contrary to the policy of the state to permit. *Id.*

INJUNCTION.

1. An order denying a temporary injunction in an action wherein there are no controverted facts and the complaint presents simply a question of law, is reviewable here. *White v. Inebriates' Home*. 128

2. The attorney-general cannot maintain an action in the name of the People against a corporation, either under the Code of Civil

Procedure (§ 1948) or as a matter of common law, to restrain the commission of a nuisance in a city street by a corporation, where local officials have authority to protect the street. *People v. Equity G. L. Co.* 232

3. The jurisdiction of a court of equity to abate an existing and prevent a threatened nuisance upon application of the attorney-general, is limited to those public nuisances which affect and endanger the public safety or convenience and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by other constituted authorities and public officers. *Id.*

— When lessor entitled to aid of court of equity to restrain violation by lessee of condition in lease.

See R. L. Association v. Kellogg. 348

INSOLVENT CORPORATIONS.

1. In an action brought by the receiver of an insolvent manufacturing corporation to set aside a transfer of property to defendant, made by the corporation in contemplation of insolvency, and so in violation of the statute (1 R. S. 603, § 4), and to compel payment of its value, the answer set up as a defense that subsequent to the transfer and before the appointment of plaintiff as receiver, third parties, under a judgment and execution against the corporation, sold the property as the property of the corporation, and so that plaintiff took no interest therein. It appeared that the amount bid on the execution sale was one dollar, and such sale was made for that sum. *Held*, that a finding was justified that the sale was made subject to the transfer. *Stonebridge v. Perkins.* 1

2. As to whether, even if a valid sale of the property upon execution had been shown, it would have constituted a defense in the absence of allegations connecting defendants with the title so obtained, *quere.* *Id.*

INSURANCE CORPORATIONS.

S., plaintiff's testator, was, prior to September 27, 1881, defendant's president and principal manager; his salary was \$5,000 per annum. On that date an agreement, negotiated by S., was entered into between defendant and another insurance company, by which the latter agreed to re-insure all the risks of the former, it being desirable, as the agreement recited, to retire from business. Defendant agreed to continue in active business until October 1, 1881, and thereafter at the risk and expense, and on account, of the other company, which then agreed to assume, and defendant agreed to assign to it, the lease of its offices. In an action to recover salary after October thirty-first, up to which time S. had drawn it, it appeared that at the date of the execution of said contract, S., by written agreement, entered into the employment of the other company at a salary of \$7,500 and commissions, he agreeing to devote his entire time to its service, unless specially authorized to undertake other duties. S. did not sign or request any check for his salary after October, and made no claim therefor. At a regular meeting of defendant's directors, S. proposed that the salary of its secretary, which was fixed at the same time as his own, should, until its business was wound up, be paid one-half by it, and one-half by the other company. Evidence was given of the rendition of some services by S. for defendant after October, and up to the time of his death, which services were mostly of a formal character, and such as he was bound to render under his contract with the other company. *Held*, that in the absence of evidence of an agreement or understanding that the salary of S. was to continue, it could not be presumed; and that the action was not maintainable. *Simonsen v. N. Y. C. Ins. Co.* 12

INSURANCE (FIRE).

1. Where by a policy of fire insurance, issued to the owner of mort-

gaged premises, loss, if any, is made payable to the mortgagee, as his interest may appear, the undertaking so to pay is collateral and dependent upon the principal undertaking, and if there is a breach of conditions in the policy by the assured, which by its terms renders it void, this defeats a recovery thereon by the mortgagee. *Moore v. Hanover F. Ins. Co.* 219

action had been commenced. *S.*, the insured, had knowledge of the foreclosure suit on the day it was commenced. *Held*, that the verbal assent of the agent did not constitute a waiver of the conditions; and that the foreclosure suit and sale rendered the policy void. *Id.*

INSURANCE (LIFE).

2. Defendant issued to *S.* a standard policy in the form prescribed by the act of 1886 (Chap. 488, Laws of 1886), loss, if any, payable to *R.*, plaintiffs' testator, mortgagee, as interest may appear. The policy contained conditions to the effect that it would become void, "unless otherwise provided by agreement," indorsed upon the policy or added thereto. "if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage." Also, that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement," and as to those that they should not be deemed to have been waived unless the waiver shall be written upon or attached to the policy. Also, that no privilege or permission affecting the insurance should be claimed unless so written or attached. In an action upon the policy these facts appeared: Plaintiffs brought an action to foreclose the mortgage, obtained judgment, and in pursuance thereof the premises were advertised to be sold. Three days before the date of sale the building insured was destroyed by fire. Before the commencement of the foreclosure suit plaintiffs informed *T.*, a duly authorized agent of defendant, who, as such agent, had signed the policy, that they were about to commence such proceedings, and he agreed that this might be done without injuring plaintiffs' rights under the policy. No such agreement or consent was indorsed upon or annexed to the policy, and it did not appear that *T.* noted upon any register kept by him that said

M. procured a policy of insurance for \$2,000 upon the life of his son, payable to himself, his executors or assigns; he died leaving a will by which he gave all of his estate to his executors in trust during the life of his widow, the principal then to be divided among his children. The son died in 1866 and the policy was collected by the executors of the father's will. In 1869 the children and devisees of said testator executed an instrument under seal, by which they assigned all their interest in the moneys collected on the policy to plaintiffs, the widow and children of the son. The widow died in June, 1891. In July thereafter defendant was appointed the administratrix with the will annexed of *M.* In an action to recover the amount of the policy, it appeared that defendant as such administratrix received of the personal estate over \$8,000, and that there were no debts. Plaintiffs' claim was presented to defendant and payment thereof refused. This action was brought in November, 1891. *Held*, that the delivery of the assignment constituted a valid irrevocable gift of the fund realized upon the policy and vested title in the donees, subject to the life interest in the widow; that plaintiff's cause of action matured at her death, and so, was not barred by the Statute of Limitations; and that the action, if not necessary, was at least proper and was not prematurely brought. *Matson v. Abbey.* 179

INTOXICATION.

1. The Civil Damage Act of 1873 (Chap. 646, Laws of 1873) is not a penal statute, but simply creates a cause of action unknown to the common law. Said act was

not repealed by the provision of the act of 1892, "in relation to excise" (§ 2, chap. 403, Laws of 1892), providing for the recovery of damages caused by the sale of intoxicating liquors in case previous notice has been given forbidding the sale. The said provision and the one upon the same subject in the act of 1892, "to revise and consolidate the laws in relation to the sale of intoxicating liquors" (§ 40, chap. 401, Laws of 1892), are to be read as simply amendatory of the act of 1873, not as repealing it by implication. *Quinlan v. Welch*.

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2. A cause of action, therefore, which accrued prior to said amendments was not affected thereby. *Id.*

8. In an action under said act of 1873 these facts appeared: Q., the father of plaintiff, who was a skilled workman and the sole support of his wife and family, and who lived in the village of P., on the afternoon of June 17, 1891, being in the village of O., visited its saloons, and among them one owned by defendant and rented by him to one whom he knew was selling intoxicating liquors therein on that day. Q. drank heavily, and in the evening boarded a train to return home; he was at that time much intoxicated; he left the train at a station before it reached P., and in attempting to walk on the railroad track to the latter place was killed; his mutilated body was found the next morning on the track, midway between that station and his home. *Held*, that the evidence was sufficient to submit to the jury as to all the essential facts required to be established to sustain the action; and so that a refusal to nonsuit was not error. *Id.*

4. The testimony showed that plaintiff was born on June eighteenth, at what hour it did not appear, nor did it appear whether Q. was killed on the morning of that day or on the previous evening. Defendant on appeal for the first time claimed that plaintiff was born after her father's death and

so, could not maintain the action. *Held*, untenable; that conceding the point was presented by the proofs, as to which *quare*, it should have been raised on trial, and the attention of the trial court not having been called to it, it could not be considered on appeal. *Id.*

INTRUSION.

While the provision of the Penal Code defining the offense of intrusion on lands (§ 467) does not in terms make the intent a material element to constitute the offense, an unlawful and criminal intent must be alleged and proved. *Hewitt v. Newburger*.

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JOINT DEBTORS.

1. In an action against joint debtors, service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action. *Yerkes v. McFadden*.

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2. So, an attachment issued in an action against several upon a joint liability, may be executed by seizure of the joint property, although the summons is served on but one of the defendants within the time prescribed, and no service by publication is commenced within that time, or if commenced is not continued to completion. *Id.*

3. Accordingly *held*, where an attachment was issued against the members of a firm as non-residents, under which the firm property was levied upon, and a service of summons by publication was commenced, but was not completed, in one of the designated newspapers within the thirty days, but personal service was made on one of the defendants, that the lien of the attachment was not lost by the failure to complete the service by publication, nor could the attachment be vacated as against any of the defendants. *Id.*

JUDGMENT.

In an action against joint debtors, service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action. *Yerkes v. McFadden*. 186

JUDICIAL SALES.

1. A sale of personal property upon execution affords no protection to a party defending under it, unless he shows, *first*, a levy, *i. e.*, such an exercise of right and dominion by the officer over the property as would subject him to an action of trespass by the owner if the levy was not justified, and *second*, a sale with the property actually present and within the view of the persons attending the sale. *Stonebridge v. Perkins*. 1

2. A sale of land on execution, issued upon a void judgment against the owner, in no way affects his title, and a subsequent conveyance by him is just as effectual as if the judgment had never in form been entered. *McCracken v. Flanagan*. 174

3. A purchaser on sale of land on execution, having paid the purchase price, and received the sheriff's certificate of sale, after obtaining the sheriff's deed is in the same position as if the deed had been executed by the judgment debtor when the judgment was docketed, and while holding the certificate he is to be regarded the same as if the debtor had at the time of docketing the judgment executed a contract of sale and received the full purchase price. *Maroney v. Boyle*. 462

4. Such a purchaser, therefore, is entitled to protection against an outstanding and unknown lien for purchase money in favor of a former grantor. *Id.*

See EXECUTION.
SALES.

JURISDICTION.

1. While after appeal to this court, in all matters pertaining to the appeal itself and to the proper hearing of, as well as all applications which by statute may be made to this court, it has jurisdiction, as to all other applications the case is to be regarded as still pending in the court of original jurisdiction, and such applications should be made to that court. *People ex rel. v. Bd. Edn.* 86

2. Where a party has obtained an undue advantage by using an order of the court for a purpose contrary to its spirit and intention, and which could and would have been guarded against had the unlawful purpose been disclosed when the order was made, the court has power to modify or amend the order, or grant a new order, to correct the abuse of the former one. *De Lancey v. Pregras*. 88

3. The courts of the state have civil and criminal jurisdiction over the navigable waters within its limits, and, in the absence of any prohibition in the Federal Constitution or laws, persons and property thereon are subject to such jurisdiction. *People v. Welch*. 266

4. The powers granted by the Federal Constitution are not exclusive unless they are made so in terms, or prohibited to the states, or are incompatible with the exercise of a concurrent jurisdiction. *Id.*

5. As to crimes committed upon navigable waters within the state, if they are such as existed at common law, and are defined in the statutes of the state, while congress may exclude the jurisdiction of the state courts, in the absence of any such exclusion, that jurisdiction may be exercised, although congress has vested jurisdiction over them in the federal courts. *Id.*

6. To exclude the jurisdiction of the state courts over such crimes, the intention of congress so to do must be distinctly manifested, and the legislation relied upon for

that purpose must be clear and unambiguous. No presumption that state authority is excluded arises from the mere fact that congress has legislated; there must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject. *Id.*

7. Accordingly *held*, that the provision of the U. S. Revised Statutes (§ 5344) which declares that every person employed on any steamboat or vessel "by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed * * * shall be deemed guilty of manslaughter," and which provides a punishment therefor, "upon conviction thereof in any Circuit Court of the United States," did not exclude the courts of the state from jurisdiction over such an offense committed upon the Hudson river; that there was no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide; and that the provision of said statutes (§ 5328) declaring that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof," was to be construed as exempting from the operation of the provision (§ 711) declaring that the jurisdiction of the federal courts shall be exclusive over "all crimes and offenses cognizable under the laws of the United States," the cases specified in the title which were punishable under the laws of the several states, at least such as were so punishable under state laws existing when the provision last mentioned was enacted. *Id.*

8. Where, therefore, defendant was convicted in a state court of the crime of manslaughter in the second degree upon evidence showing that, while acting as a duly licensed pilot in charge of a steam tug on the Hudson river, through his "willful misconduct, negligence and inattention to his duties," the tug collided with a yacht, causing the death of a person on board the yacht, *held*, that

the state court had jurisdiction to punish defendant for the crime. *Id.*

9. In an action instituted in 1889 to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interests of her cotenants, who also assigned to her their rights of action and claims for damages. Plaintiff claimed for damages sustained prior to March, 1887, as well as since. On the trial defendants moved that the action be severed and that the claim for damages acquired by assignment be sent to a jury; this was denied. *Held*, no error; that if the court decided that the claim for equitable relief was well founded, it was within its discretion to assess all the damages sustained to which plaintiff was entitled, whether belonging to her as owner or acquired by a assignment, and that defendants had no absolute right to have them determined by a jury. *Hunter v. Manhattan R. Co.* 281
10. A Court of Sessions, after a conviction of the crime of grand larceny, suspended sentence during good behavior. *Held*, that this was within the jurisdiction of the court, and so that the granting of a writ of mandamus upon application of the district attorney, requiring said court to proceed to sentence and judgment, was error. *People ex rel. v. Ct. of Sessions.* 288
11. When certain facts are to be proved to a court having only a special and limited jurisdiction as a basis of its action a total defect of evidence as to any essential fact renders its action void. *Hewitt v. Neuburger.* 538
12. Plaintiff was arrested by virtue of a warrant issued by the recorder of the city of Amsterdam, upon information sworn to by defendant, based upon the provision

of the Code of Criminal Procedure (§ 84) authorizing an information to be laid before a magistrate that a person has threatened to commit a crime against "the person or property of another." The information charged that plaintiff threatened to commit the crime of injuring property of a corporation named (Penal Code, §§ 639, 654), in that he threatened to tear down a wall then being erected thereon, and there was just reason to fear that he would tear down and demolish it. The warrant recited the facts substantially as stated in the information; neither alleged any unlawful or criminal intent. In an action for false imprisonment it appeared that defendant asked that the warrant be issued; he received and delivered it to the chief of police with a request that it be served "right away." After the arrest plaintiff was taken to the recorder's office, and thereafter, on motion of his counsel, the proceeding was dismissed. *Held*, that the recorder acquired no jurisdiction, and so the warrant and all proceedings under it were absolutely void; and that defendant was liable. *Id.*

13. The jurisdiction of this court on appeal from a judgment of General Term affirming a surrogate's decree on settlement of the accounts of executors is limited to questions of law presented by proper exceptions. *In re Bolton*. 554

LACHES.

In an action against a surviving partner for misappropriation of the firm assets, it appeared that the deceased partner died in 1880. In that year an action against the surviving partner was commenced. The litigation was not concluded until the latter part of the year 1886. Early in the year 1888 the action against all the wrongdoers was commenced. *Held*, that a refusal to dismiss the complaint on the ground of inexcusable laches was proper; that the record disclosed reasonable cause for the delay. *Russell v. McCall*. 437

LANDLORD AND TENANT.

In an action to recover rent due under a lease of premises in the city of New York the defense was an eviction. The only act of the lessors upon which the defense was attempted to be supported was the giving to contractors for an excavation upon an adjoining lot a permit to enter on the premises, as required by the Consolidation Act (§ 474, chap. 410, Laws of 1882), in order to subject the party making the excavation to the obligation of protecting the building on the leased premises from injury. *Held*, that in the absence of any reservation in the lease of a right to enter for such a purpose, the permit of the lessors alone was insufficient to give a right of entry to the licensees, but the consent of the lessees was also necessary, and so, if the contractors entered without defendant's consent, for their trespass plaintiffs were not responsible, and the defense was not established. *McKenzie v. Hatton*. 6

LARCENY.

1. A Court of Sessions, after a conviction of the crime of grand larceny, suspended sentence during good behavior. *Held*, that this was within the jurisdiction of the court, and so that the granting of a writ of mandamus upon application of the district attorney, requiring said court to proceed to sentence and judgment was error. *People ex rel. v. Court of Sessions*. 288

LAW OF PLACE.

See CONFLICT OF LAWS.

LEASE.

Plaintiff, a corporation incorporated for camp meeting and religious purposes, and owning lands for those purposes, adopted a constitution which gave to its trustees the general oversight of all the business of the association and provided for the election by them

of an executive committee which should have power to act for them during the interim of their regular meetings, and also have general oversight of all the interests of the camp meeting, and should arrange the prices for ground rents and other privileges. Plaintiff leased two lots upon the grounds of said corporation; each lease was for the term of ninety-nine years, and contained conditions to the effect that it was "subject to all the rules and regulations which may from time to time be adopted and promulgated" by plaintiff for the government of its grounds, which were declared to be a part of the lease as if incorporated therein. These leases were assigned to plaintiff, who erected a store on the demised premises. Plaintiff's executive committee thereafter adopted certain rules and regulations, copies of which were posted in public places, distributed among the cottages on the grounds and received general recognition by the association, providing, among other things, that goods or merchandise should not be sold on any of the lots leased by the association without a license or permission being first obtained from its officers. Said executive committee gave to defendant a permit to conduct a store on his lots for the term of five years upon payment of a sum specified annually; after the first year defendant refused to pay the specified sum, and continued to sell goods although notified by plaintiff's superintendent to desist from so doing without a license. In an action to restrain defendant from selling any goods on the lots without having first obtained a license, *held*, that the executive committee had power to enact said rules and regulations; that a finding that they were reasonable and proper was justified; that the conditions in the leases were valid as between the parties and were binding upon defendant as assignee; that plaintiff was entitled to the aid of a court of equity to compel defendant to observe said conditions; and so, that a judgment restraining him from selling any goods or merchandise upon the lots without

first obtaining a license was proper. *Round Lake Assn. v. Kellogg.* 848

See LANDLORD AND TENANT.

LEGACIES.

C., a widow, died leaving a son ten years of age her sole heir and next of kin. Her will, after some trifling bequests, contained this clause: "I will and bequeath to John E. Lee all debts, dues and demands of name, nature and kind soever I hold against him and his wife, my trunk and any keepsakes he may wish." The residue of her estate she gave to her son, to be invested by a guardian provided for, and the interest used for the education and support of her son. Mrs. Lee owed to the testatrix \$58 upon a chattel mortgage on "saloon furniture," and \$170 on what was called a chattel lien executed by her on certain horses in her possession and used by her husband as her agent. The testatrix also owned a bond and mortgage of \$1,262, executed by Mrs. Lee on the purchase by her of the land mortgaged; her husband joined in the bond. This land Mrs. Lee had sold previous to the execution of the will, conveying the same by warranty deed clear of incumbrance. The purchaser, however, retained the amount of the bond and mortgage and paid only the balance of the purchase money. This was known to the testatrix when she executed the will. The estate of the testatrix netted for distribution less than \$8,000. After her death, by direction of Lee, who was the executor of the will, the purchaser of said land handed to Mrs. Lee the part of the purchase money so retained, who at the same time paid it over to the executor and received a discharge of the mortgage. *Held*, that the bequest to Lee did not include said bond and mortgage. *In re Lee.* 58

LEGATEES.

1. Where the loss of a testamentary trust fund is caused by the waste or misconduct of the executor and

trustee, no claim for contribution arises against the residuary legatees. *Mills v. Smith.* 256

2. *It seems*, such legatees are liable to refund in case they have been paid from the estate without a decree authorizing the payment, and in consequence there is a deficiency of assets to discharge prior claims or to pay other legatees, but in the absence of collusion or fraud on their part, they take the payment without other risk. *Id.*
3. By the will of M. a sum was given to his executors to be held in trust for the benefit of T. during life, the trust fund to be invested in bonds and mortgages, and upon his death to be distributed among his children. In an action by the sole surviving child of T., brought after his death, to compel the residuary legatees to account, and to pay the amount of the trust fund, it appeared that there had been a final accounting by the executors, and at that time the amount of the trust fund was in their hands in bonds and mortgages, which were held by them as the trust fund, and no part thereof was ever paid to the residuary legatees. Neither T. nor plaintiff were cited to appear upon the accounting. By the surrogate's decree thereon, the executors were credited with the amount of the trust fund. *Held*, that in the absence of proof of any fraudulent conversion or combination on the part of the residuary legatees whereby the trust fund was affected or divested, no claim was established against them; that the trust fund having been invested and set apart as prescribed by the will, and the trust being in that condition at the time of the decree, the irregularity in not citing plaintiff and T. did not render the distribution of the residuary estate invalid; that plaintiff's interest was simply in the trust fund, and he had no concern in the distribution of the residue; that for any breach of duty upon the part of the executors and trustees his remedy was against them, not against the distributees. *Id.*

LIEN.

1. A grantor of land does not waive his equitable lien for unpaid purchase money by taking the promissory note of the grantee therefor, although in taking it he relies upon the solvency and financial ability of the grantee to pay the note, and does not have in contemplation the enforcement of the lien; he retains it, unless he expressly and consciously relinquishes it. *Maroney v. Boyle.* 482
2. The lien is valid against one who takes a conveyance from the grantee with knowledge of the existence of the claim for the unpaid purchase money. *Id.*
3. This equitable lien, however, will not prevail against one, without notice thereof, who takes an incumbrance on the land, an interest therein or a conveyance thereof, in good faith and for a valuable consideration. *Id.*
4. Where, in an action by a grantor to enforce a lien for unpaid purchase money, it appeared that defendant D. purchased the land on sale under an execution against one who, at the time of the rendition of the judgments, held the record title under a deed from plaintiff's grantee; that D. purchased in good faith without notice of plaintiff's lien, and paid the purchase price in full; that at the time of the commencement of the action he held the sheriff's certificate of sale and thereafter received the sheriff's deed, *held*, that the lien was not enforceable; also, that the rights of D. were not affected by the fact that the purchase price paid by him was small. *Id.*

See FORECLOSURE. MORTGAGE.

LIMITATIONS (STATUTE OF).

1. M. procured a policy of insurance for \$2,000 upon the life of his son, payable to himself, his executors or assigns; he died leaving a will by which he gave all of his estate to his executors in trust during the life of his widow, the principal

then to be divided among his children. The son died in 1866 and the policy was collected by the executors of the father's will. In 1869 the children and devisees of said testator executed an instrument under seal, by which they assigned all their interest in the moneys collected on the policy to plaintiffs, the widow and children of the son. The widow died in June, 1891. In July thereafter defendant was appointed the administratrix with the will annexed of M. In an action to recover the amount of the policy, it appeared that defendant as such administratrix received of the personal estate over \$8,000, and that there were no debts. Plaintiffs' claim was presented to defendant and payment thereof refused. This action was brought in November, 1891. *Held*, that plaintiffs' cause of action matured at her death, and so, was not barred by the Statute of Limitations; and that the action, if not necessary, was at least proper and was not prematurely brought. *Matson v. Abbey*. 179

2. *It seems* that in the case of an attorney who has collected money for a client, the Statute of Limitations begins to run against the latter's cause of action from the time he has knowledge of the collection. *Wood v. Young*. 211

3. Plaintiff executed to her half-brother C., defendant's testator, a power of attorney, authorizing him to collect the amount of an insurance policy held by her upon the life of her deceased husband. C. collected the amount, and without the consent of plaintiff appropriated it to his own use, and never paid the same or any part thereof or accounted to her therefor. On reference of a claim for the amount it appeared that for more than ten years before the presentation of the claim, plaintiff supposed and believed C. had received the money, but that she never demanded the same. *Held*, that the claim was properly dismissed on the ground that it was barred by the Statute of Limitations; that no trust or fiduciary relation existed between the

parties growing out of their relationship, which required a demand or actual knowledge of the facts by plaintiff before the right of action accrued; and that the only legal relation between the parties was that of debtor and creditor. *Id.*

4. Plaintiff had a cause of action against R., defendants' testator, upon a parol agreement; the right of action accrued March 31, 1882. On March 30, 1888, a summons and complaint in an action by plaintiff against R. upon said cause of action was delivered to the sheriff of the county wherein the parties resided with the intent that the same should be actually served. The sheriff on that day attempted in good faith to serve the papers, but R. was at the time sick and his physician refused access to him; he died four days thereafter. The claim was presented to defendants, who rejected it, and upon refusal to refer, this action was commenced thereon October 2, 1889. The Statute of Limitations was pleaded as a defense. *Held*, that there was an attempt to commence the action against R. within six years, which, under the Code of Civil Procedure (§ 399), was equivalent to its commencement; that plaintiff did not lose the benefit of this by failure to serve the summons personally or to commence service by publication within sixty days thereafter, as plaintiff was prevented from doing this by R.'s death; that the delivery of the process to the sheriff saved the claim against the bar of the statute up to the date of such death, and then it was further suspended by said Code for eighteen months (§ 403), and as, within that time the action was commenced it was not barred by the statute. *Riley v. Riley*. 409

5. In order to make a money payment a part payment of a debt, so as to take the case out of the operation of the Statute of Limitations, it must appear that the payment was made upon the particular debt, and was accepted by the creditor as such, and also that it was accompanied by circum-

stances amounting to an absolute and unqualified acknowledgment by the debtor that more was due, so that a promise to pay the remainder may be inferred; mere proof of payment, without anything to show on what account or for what reason the money was paid, is of no avail to defeat the operation of the statute. *Crow v. Gleason*. 489

6. In an action brought April 28, 1890, to recover for the use of horses from April 26, 1875, to November, 1885, plaintiff's ledger showed payments at different times, the last one being credited November 13, 1885. Plaintiff never presented a statement of the general account to defendant, and so far as appeared never mentioned it to him. Bills were presented to defendant after the middle of April, 1884, to the end of the account for horses let during the previous week or month, upon which payments were made. It did not appear that defendant knew or believed that he owed the plaintiff any account that antedated the date last mentioned. *Held*, that all of the account prior to April 28, 1884, was barred by the statute. *Id.*

MANDAMUS.

1. A mandamus, however, may not be issued on the relation of the board of commissioners of fisheries to compel a justice of the peace to pay over fines collected by him for violation of the act for the preservation of fish and game (§§ 238, 240, chap. 488, Laws of 1892), as amended in 1893 (Chap. 573, Laws of 1893), as the relator has an adequate remedy at law, and that is the remedy provided by the statute. *People ex rel. v. Crennan*. 239
2. A Court of Sessions, after a conviction of the crime of grand larceny, suspended sentence during good behavior. *Held*, that this was within the jurisdiction of the court, and so that the granting of a writ of mandamus upon application of the district attorney, requiring said court to proceed to

sentence and judgment, was error. *People ex rel. v. Ct. of Sessions*. 288

3. While a mandamus against a public officer or municipality is a proper remedy to compel the performance of a ministerial duty, plainly prescribed, and that remedy may be invoked in behalf of any person interested in its performance, in case of failure to perform the duty, where the officer or body is clothed with a discretion either to do or omit to do the act, a mandamus can only issue to compel a decision, in case of refusal to decide, and where a decision has been made the court cannot, on mandamus, review the decision or compel one the other way. *People ex rel. v. Maher*. 380

MANSLAUGHTER.

1. The provision of the U. S. Revised Statutes (§ 5344) which declares that every person employed on any steamboat or vessel "by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed * * * shall be deemed guilty of manslaughter," and which provides a punishment therefor, "upon conviction thereof in any Circuit Court of the United States," does not exclude the courts of the state from jurisdiction over such an offense committed upon the Hudson river. There is no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide, and the provision of said statutes (§ 5328) declaring that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof," is to be construed as exempting from the operation of the provision (§ 711) declaring that the jurisdiction of the federal courts shall be exclusive over "all crimes and offenses cognizable under the laws of the United States," the cases specified in the title which were punishable under the laws of the several states, at least such as were so punishable under state laws existing when the provision last men-

tioned was enacted. *People v. Welch.* 266

2. Where, therefore, defendant was convicted in a state court of the crime of manslaughter in the second degree upon evidence showing that, while acting as a duly licensed pilot in charge of a steam tug on the Hudson river, through his "willful misconduct, negligence and inattention to his duties," the tug collided with a yacht, causing the death of a person on board the yacht, *held*, that the state court had jurisdiction to punish defendant for the crime. *Id.*

MANUFACTURING CORPORATIONS.

1. The provision of the Revised Statutes prohibiting a corporation from declaring dividends, except from surplus profits (1 R. S. 589, § 1), does not apply to a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848); the trustees of such a corporation have power to declare and pay dividends, at least until some judicial restraint intervenes to prevent, although there are no surplus profits, and in so doing simply subject themselves to the penalty imposed by the act (§ 13). *People ex rel. v. Barker.* 251
2. Where, in proceedings by certiorari to review the action of the commissioners of taxes and assessments of the city of New York, in assessing such a corporation, it appeared that the assessment was based solely upon statements of the relator in answer to questions put by the commissioners, which statements showed that the capital was impaired and that the indebtedness of the company exceeded the value of its assets exclusive of real estate, and did not disclose any fact or circumstance justifying a disbelief of the answers made, except that a dividend had been declared and paid shortly previous, *held*, that this did not authorize a disbelief in the statement of the impairment of capital, and, in the absence of any

request on the part of the commissioners for further information, did not justify them in imposing a tax, as the statements, if accepted as true, showed that there was no basis therefor. *Id.*

MISTAKE.

1. While a party to a written instrument may not invoke the aid of a court of equity because of a mistake of law on his part, where there is no improper conduct on the part of the other party, where the mistake on his part is shown, and also either positive fraud or inequitable, unfair and deceptive conduct on the other side, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. *Hariland v. Willets.* 35
2. H. died leaving the plaintiff his sole heir and next of kin him surviving, and leaving a will by which he gave a legacy to plaintiff, and his residuary estate to two persons named, one-half to each. One of these died before the testator, leaving two children; the other was executor under the will and the sole surviving executor. Plaintiff was, at the testator's death, seventy-three years of age. Both he and the executor believed at the time of the reading of the will that the share of the residuary legatee who had died went to his children. The executor then proposed to give plaintiff a sum specified, he to release all his interest in the estate. Before, however, an agreement was perfected, the former discovered that such legacy had lapsed and that the share went to plaintiff. Without disclosing this the executor drew up an agreement of release which contained no statement of the facts; this plaintiff signed. Subsequently the executor took plaintiff to his counsel, and there plaintiff executed a more formal instrument, which recited the death of said residuary legatee and the desire and intention of plaintiff to relinquish to the children of the deceased legatee all the rights and interests acquired by him as heir at law and next of kin, and by

which, in consideration of payment of the sum agreed upon, he released and discharged such interests and authorized payment thereof to said children. In an action to set aside said release it appeared that it was read at the time it was executed, and that the counsel stated, after the release was signed, that by the lapse of the legacy, the ownership thereof vested in plaintiff; this statement was couched in legal terms, and plaintiff testified that he did not hear the statement either of counsel or as read. *Held*, that a question of fact was presented, and this court could not dispute a finding that plaintiff did not know his legal rights when he executed the release; and that, as the evidence showed a studious concealment from plaintiff by the executor, in whose position and ability the former reposed some confidence, of the precise point essential to his free and intelligent action, it was competent for a court of equity to cancel the release, so far as lawful payments had not been made under it. *Id.*

3. The executor died, and two days thereafter plaintiff was fully advised of his legal rights; for three years he remained silent, without revoking the release, giving any notice of change of intention, or making any complaint, although knowing that the estate was being administered in accordance with it. During the three years large sums were paid to said children out of the estate by the administrators with the will annexed. *Held*, that plaintiff was estopped from recovering back said sums either from said administrators or the persons to whom they were paid; but was entitled to an accounting and to payment of the amount of said residuary share, less the amount paid to plaintiff over and above his legacy and the sums so paid to the children of the deceased legatee. *Id.*

MONEY HAD AND RECEIVED.

The duty rests upon a party receiving money for the use of another to pay it over as soon as received,

or, at least, within a reasonable time, and an action is maintainable by the later to recover the same without demand. *Wood v. Young.* 211

MORTGAGE.

Where by a policy of fire insurance, issued to the owner of mortgaged premises, loss, if any, is made payable to the mortgagee, as his interest may appear, the undertaking so to pay is collateral and dependent upon the principal undertaking, and if there is a breach of conditions in the policy by the assured, which by its terms renders it void, this defeats a recovery thereon by the mortgagee. *Moore v. Hanover F. Ins. Co.* 219

See FORECLOSURE.

MOTIONS AND ORDERS.

1. Where one claiming under an assignment of his commissions, executed by an executor before settlement of his accounts, appealed from an order of the General Term affirming an order of the surrogate denying a motion made by said assignee to open and modify his decree, made on settlement of the accounts of the executors, which decree refused commissions to the assignee, *held*, that the appellant had no interest authorizing him to make the motion or bring the appeal. *In re Worthington.* 9

2. Where a party has obtained an undue advantage by using an order of the court for a purpose contrary to its spirit and intention, and which could and would have been guarded against had the unlawful purpose been disclosed when the order was made, the court has power to modify or amend the order, or grant a new order, to correct the abuse of the former one. *De Lancey v. Priepgras.* 88

3. This court may not review even a void order in an action when it does not affect a substantial right. *Id.*

4. After judgment in an action of ejectment an order was granted under the Code of Civil Procedure (§ 1525), setting aside the judgment and granting a new trial. Subsequently, on motion of defendant, an order was granted setting aside said prior order, amending and modifying the judgment and execution, with leave to apply again for leave to vacate the amended judgment for the purposes of a new trial, but refusing to set aside the execution, under which plaintiff had been put in possession. On appeal from the order, *held*, that it was one addressed to the discretion of the court below and so was not reviewable here. (Code Civ. Pro. § 190.) *Id.*
5. After defendant had secured the amendment to the judgment and execution he again resumed possession of the premises and excluded plaintiff therefrom by force. Upon application of the latter, defendant was ordered forthwith to restore such possession, and thereafter to desist from any physical resistance or interference with plaintiff's possession. *Held*, that the making of the order was within the power of the court; that plaintiff was not required to resort to some new and independent action or proceeding to regain possession. *Id.*
6. Where after appeal to this court the appellant's attorneys at her request substituted another in their place, *held*, that a motion for order directing the former attorneys to turn over the papers in the case to the substituted attorney was not properly made here, but should have been made in the court below. *People ex rel. v. Bd. Edn.* 86
7. Where an order of General Term affirming an order of Special Term which denied a motion for a bill of particulars, does not state the ground for the denial, it will be assumed that it was in the exercise of the discretion of that court, and so, the order may not be reviewed here. *Cohn v. Baldwin.* 563
8. The opinion of the General Term may not be looked to to ascertain the ground. *Id.*

MUNICIPAL CORPORATIONS.

It seems, the authorities of a city cannot legalize an obstruction of a city street so as to bar the public right, and a building projecting into a street, although originally built with the consent of the city, is an unlawful obstruction and a public nuisance, and the user, although long continued, is no obstacle to proceedings for its removal. *People ex rel. v. Maher.* 330

See ALBANY (CITY OF).
BROOKLYN (CITY OF).
NEW YORK (CITY OF).
YONKERS (CITY OF).

MURDER.

1. Upon the trial of an indictment for murder in killing H., a police detective, who had the defendants under arrest at the time of the homicide, the prosecution was allowed to prove that previous to the homicide a burglary had been committed, also, to prove facts and circumstances tending to show that H., when he made the arrest, had reasonable grounds to believe defendants had committed that crime. *Held*, no error; that the evidence was competent as showing that H. was justified in making the arrest without a warrant. (Code Crim. Pro. § 177, subd 3.) *People v. Wilson.* 185
2. L. and C. were jointly indicted; they demanded separate trials. On the trial of L. the evidence for the prosecution showed these facts: On the day of the homicide, the defendants entered a restaurant; a burglary had been previously committed; as they passed the bar, a waiter said in their hearing: "There goes the burglars." The proprietor of the restaurant telephoned to police headquarters, and in a few minutes H. came; he followed defendants as they went out on the street, tapped them on the shoulders, and, after stopping

in a doorway, apparently in conversation, for a short time, proceeded with them toward the police station. Being compelled to turn out into the street because of an obstruction on the sidewalk, H. took each prisoner by the arm. After proceeding a short distance, C., exclaiming "let her go," drew his revolver, seized H., drew him around and struck him on the head with the weapon. L. broke away from the grasp of H., and, when eight or ten feet distant, turned and deliberately shot him through the head, killing him instantly. *Held*, that a verdict of murder in the first degree was justified. *Id.*

3. When L. was arrested, it appeared that he had two revolvers, both of which were loaded; he was found secreted under a stoop; he had had abundant opportunity to reload, and there was testimony tending to show he was engaged in that act when crossing a bridge after the shooting, and when arrested, cartridges, fitting both of his revolvers, were found upon his person. *Held*, the fact that the revolvers were found loaded was not material. *Id.*

4. *It seems* that, conceding the arrest by H. was unlawful, this did not justify or affect the character of the homicide. *Id.*

NAVIGATION.

1. The courts of the state have civil and criminal jurisdiction over the navigable waters within its limits, and, in the absence of any prohibition in the Federal Constitution or laws persons and property thereon are subject to such jurisdiction. *People v. Welch*. 286
2. As to crimes committed upon navigable waters within the state, if they are such as existed at common law, and are defined in the statutes of the state, while congress may exclude the jurisdiction of the state courts, in the absence of any such exclusion, that jurisdiction may be exercised, although congress has vested jur-

isdiction over them in the federal courts. *Id.*

3. To exclude the jurisdiction of the state courts over such crimes, the intention of congress so to do must be distinctly manifested, and the legislation relied upon for that purpose must be clear and unambiguous. No presumption that state authority is excluded arises from the mere fact that congress has legislated; there must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject. *Id.*

NEGLIGENCE.

1. P., defendant's testator, was a private banker in New York city; by circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Plaintiff employed P. to loan for him \$25,000, which the latter agreed to do gratuitously; he loaned the money, taking as collateral certain certificates of corporate stock, which had by a forgery been raised so as to represent a larger number of shares than they were issued for, and in consequence a loss resulted. In an action to recover damages, *held*, that the fact that the services of P. were rendered gratuitously did not free him from the obligation to exercise such diligence as he had promised to those dealing with him, nor was he at liberty to withhold from his agency the exercise of the skill and knowledge he held himself out to possess, and so, if the loss resulted from failure to exercise ordinary skill and knowledge, he was liable. *Isham v. Post*. 100
2. Plaintiff proved the delivery to P. of the amount specified, to be loaned and returned on demand, and that the latter refused to return the same on proper demand. *Held*, that the burden was upon defendant of proving affirmatively that P. did his duty fully and faithfully and without negligence or misconduct, and so that the loss was without his fault. *Id.*

8. It appeared that the loan was made to a firm in good repute and standing at the time; that the original certificates were genuine and lawful, and had been issued six years previously to a member of the firm, who had executed the usual blank assignments enabling them to pass from hand to hand, and were attested by his firm. The loan was made by P.'s managing clerk, who had had an extensive experience in such transactions, and had handled many of the certificates of the company whose stock was taken as collateral. The clerk took the certificates without close or careful scrutiny. The trial court found that P. was negligent in making the loan upon the security of the certificates, on the ground that he took them without examination, without presenting them for verification at the office of issue or registry and without inquiry as to the solvency of the borrowing firm. *Held*, that the care P. was bound to exercise did not require him to make inquiries or present the certificates for verification, but as to the omission to give the certificates a proper examination the finding could not be held error as matter of law. *Id.*
4. Defendant offered to show that P. lent \$50,000 of his own money, accepting as collateral similarly raised certificates; also that the certificates in question had been given and received on the street as collateral for loans, and deceived the skill of a great number of bankers and brokers who took and held them without suspicion. This testimony was objected to and excluded. *Held*, error, as the proof, if made, would have shown good faith on defendant's part and would have excused and justified the failure to discover the forgery. *Id.*
5. While, in an action for negligence, the absence of negligence on the part of the plaintiff, contributing to the injury, must be shown by him affirmatively, this may be done by circumstantial as well as direct evidence, and if different conclusions may be drawn from the circumstances proved, the question of negligence is one of fact for the jury or a trial court. *Chisholm v. State.* 246
6. The state erected a new highway bridge over the Erie canal, which, being wider than the old one, rendered a widening of the approaches necessary. The approach at one end was not graded up to the bridge for some days, and thus a hole was left which was unsafe and dangerous, without proper guards. No guards or lights were furnished, and plaintiff, in crossing the bridge on a very dark night, stepped into the hole and was injured. Upon a claim presented to the Board of Claims it appeared that plaintiff was not aware of the dangerous condition of the approach. *Held*, that the facts showed negligence on the part of the state and justified a finding that there was no contributory negligence on the part of the claimant. *Id.*
- NEW YORK (CITY OF).
1. In an action to recover rent due under a lease of premises in the city of New York the defense was an eviction. The only act of the lessors upon which the defense was attempted to be supported was the giving to contractors for an excavation upon an adjoining lot a permit to enter on the premises, as required by the Consolidation Act (§ 474 chap. 410, Laws of 1882), in order to subject the party making the excavation to the obligation of protecting the building on the leased premises from injury. *Held*, that in the absence of any reservation in the lease of a right to enter for such a purpose, the permit of the lessors alone was insufficient to give a right of entry to the licensees, but the consent of the lessees was also necessary, and so, if the contractors entered without defendant's consent, for their trespass plaintiffs were not responsible, and the defense was not established. *McKenzie v. Hatton.* 6
2. Defendants, being about to erect a building in the city of New York upon a lot adjoining a store

leased and occupied by plaintiffs, which required an excavation below the foundation of plaintiffs' store, entered into a contract with a firm of professional "shorers," by which that firm agreed "to do the shoring, sheath-piling and bridging (as required by law) that is necessary to erect" the building on defendants' lot, and to be responsible for any accident by improperly doing the work. Said firm, as plaintiffs' evidence tended to show, without their permission and against their protest, entered upon their premises, broke through the walls, inserted needle beams, and occasioned serious damage to their stock of goods. It did not appear that defendants gave any directions to the contractors, advised the entry, or had any knowledge of the circumstances under which the latter entered upon plaintiffs' premises. In an action of trespass the trial court charged that if plaintiffs gave no license to the contractors defendants were liable for the injury. *Held*, error; that defendants had a lawful right to make the excavation, and no duty rested upon them to protect plaintiffs' building save as imposed by the act of 1855 (Chap. 6, Laws of 1855), which requires lot owners in said city proposing to excavate their lots to a depth of more than ten feet to protect, at their own expense, a wall on adjacent premises at or near the boundary line "if afforded the necessary license to enter on the adjoining land and not otherwise;" that the contractors were not authorized by the contract to enter plaintiffs' premises without permission, but were simply employed to discharge the obligation imposed upon defendants by said act, which required consent as a prerequisite to such entry. *Ketcham v. Newman*. 205

8. Where, in proceedings by certiorari to review the action of the commissioners of taxes and assessments of the city of New York in assessing a manufacturing corporation, it appeared that the assessment was based solely upon statements of the relator in answer

to questions put by the commissioners, which statements showed that the capital was impaired and that the indebtedness of the company exceeded the value of its assets exclusive of real estate, and did not disclose any fact or circumstance justifying a disbelief of the answers made, except that a dividend had been declared and paid shortly previous, *held*, that this did not authorize a disbelief in the statement of the impairment of capital, and, in the absence of any request on the part of the commissioners for further information, did not justify them in imposing a tax, as the statements, if accepted as true, showed that there was no basis therefor. *People ex rel. v. Barker*. 251

4. In an action to compel the cancellation of a lease, executed and delivered by the comptroller of the city of New York, upon a sale of land for unpaid taxes, it was conceded that the lease was void because the sale included an illegal charge for interest; but it was claimed by defendant, the lessee, that the lease constituted no cloud on plaintiffs' title, as it was ineffective to give a right of possession or establish a title, because no notice to redeem had been given the occupant or owner, and a comptroller's certificate obtained, as required by the statute (§§ 13-16, chap. 381, Laws of 1871), before the lease could be recorded. *Held*, that while, until the certificate was given, no title passed by the lease, and so, it might not constitute an actual cloud, yet it was a decisive step towards it, and a threat and menace to create one in the future, and as the invalidity of the lease did not appear upon its face, the court had jurisdiction to grant the relief sought. *King v. Townshend*. 358

NON-RESIDENTS.

1. By the will of S. he gave his residuary estate to his wife, "to be used and enjoyed by her" during her life or as long as she should remain his widow, the same to be "received and accepted" by her in lieu of dower.

The testator left personal estate only, which was converted into money. The executor died and an administrator with the will annexed was appointed, who incurred some expense as such. Upon settlement of the executor's accounts the surrogate decreed that the whole fund should be paid over by the administrator of the executor directly to the widow, who was then a resident of another state, and that she was entitled to the possession thereof without giving security. *Held*, error; that the administrator with the will annexed was entitled to have the money paid over to him, and if he had made any disbursements, or incurred any obligations properly chargeable to the estate, he was entitled to an opportunity of proving this and to a decree for their payment; also, that the will simply gave to the widow an estate for life or during widowhood, and upon the happening of either event the remaindermen were entitled to the whole corpus of the estate; that as the property was not of a kind which must be individually possessed in order to be enjoyed, she was not entitled to possession without giving security. *In re McDougall*. 21

2. Foreign corporations are included within the terms of the act of 1855 (Chap. 37, Laws of 1855) subjecting non-residents doing business in this state to assessment and taxation on all sums invested in such business. *People ex rel. v. Barker*. 118

3. A person or corporation liable to assessment and taxation under the act is not entitled to a deduction of debts. *Id*.

4. In assessing unoccupied lands in said county belonging to plaintiff, who was a non-resident of the county, the name of plaintiff was inserted in the first column of the assessment roll, under the head of non-residents, and his place of residence was written under the name in that column. In all other respects the provisions of the statute in respect to the assessment of non-resident lands were

complied with. (1 R. S. 390, §§ 9, *et seq.*) In the warrant attached to the roll the collector was commanded to collect from the persons whose names are inserted in the first column, "other than such persons as are named as a part of the description of the lands of non-residents." In an action to compel the cancellation of a deed given on sale of said lands for non-payment of the taxes, *held*, that the assessment was made in such form as, at least, to leave it open to doubt whether plaintiff's name was so entered as a part of the description of the lands, or for the purpose of including him among the taxable inhabitants; that there was not a substantial compliance with the statute, and so that plaintiff was entitled to the relief sought. *Sanders v. Downs*. 422

NOTICE.

1. A contractor with the owner of land for the erection of a building thereon executed to C., who had furnished materials, an order upon the owner directing him to pay C. a sum specified, and deduct the same from the amount of the contract. In an action to recover the amount of the order, *held*, that the order amounted to an equitable assignment *pro tanto*; but that, in the absence of due prior notice to the owner of the assignment, he was only liable for the amount remaining unpaid on the contract when the action was brought. *Crouch v. Muller*. 495

2. Defendant was a German who did not understand English; the order was shown to him and described as a note for him to sign for the amount stated therein. *Held*, that this was not due notice. *Id*.

NUISANCE.

1. The attorney-general cannot maintain an action in the name of the People against a corporation, either under the Code of Civil Procedure (§ 1948) or as a matter of common law, to restrain the commission of a nuisance in a city street by a corporation, where

local officials have authority to protect the street. *People v. Equity G. L. Co.* 232

2. The jurisdiction of a court of equity to abate an existing and prevent a threatened nuisance upon application of the attorney-general, is limited to those public nuisances which affect and endanger the public safety or convenience and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by other constituted authorities and public officers. *Id.*

3. Accordingly held, that an action brought by the attorney-general in the name of the People was not maintainable against an incorporated gas company, a contractor with it and one of its officers, to restrain the laying of gas pipes in a street in the city of Brooklyn, which was based on the ground that the corporate power of the company had ceased because of failure on its part to commence its business within the period prescribed by law, and that the work would be an injury to the highway and a nuisance. *Id.*

4. *It seems*, the authorities of a city cannot legalize an obstruction of a city street so as to bar the public right, and a building projecting into a street, although originally built with the consent of the city, is an unlawful obstruction and a public nuisance, and the user, although long continued, is no obstacle to proceedings for its removal. *People ex rel. v. Maher.* 330

OFFICE AND OFFICERS.

1. S., plaintiff's testator, was, prior to September 27, 1881, defendant's president and principal manager; his salary was \$5,000 per annum. On that date an agreement, negotiated by S., was entered into between defendant and another insurance company, by which the latter agreed to re-insure all the risks of the former, it being desirable, as the agreement recited, to retire from business. Defendant agreed to continue in active business until October 1, 1881, and

thereafter at the risk and expense, and on account, of the other company, which then agreed to assume, and defendant agreed to assign to it, the lease of its offices. In an action to recover salary after October thirty-first, up to which time S. had drawn it, it appeared that at the date of the execution of said contract, S., by written agreement, entered into the employment of the other company at a salary of \$7,500 and commissions, he agreeing to devote his entire time to its service, unless specially authorized to undertake other duties. S. did not sign or request any check for his salary after October, and made no claim therefor. At a regular meeting of defendant's directors, S. proposed that the salary of its secretary, which was fixed at the same time as his own, should, until its business was wound up, be paid one-half by it, and one-half by the other company. Evidence was given of the rendition of some services by S. for defendant after October, and up to the time of his death, which services were mostly of a formal character, and such as he was bound to render under his contract with the other company. *Held*, that in the absence of evidence of an agreement or understanding that the salary of S. was to continue, it could not be presumed; and that the action was not maintainable. *Simonson v. N. Y. C. Ins. Co.* 12

2. While a mandamus against a public officer or municipality is a proper remedy to compel the performance of a ministerial duty, plainly prescribed, and that remedy may be invoked in behalf of any person interested in its performance, in case of failure to perform the duty, where the officer or body is clothed with a discretion either to do or omit to do the act, a mandamus can only issue to compel a decision in case of refusal to decide, and where a decision has been made the court cannot, on mandamus, review the decision or compel one the other way. *People ex rel. v. Maher.* 330

3. *It seems*, the authorities of a city cannot legalize an obstruction of a

city street so as to bar the public right, and a building projecting into a street, although originally built with the consent of the city, is an unlawful obstruction and a public nuisance, and the user, although long continued, is no obstacle to proceedings for its removal. *Id.*

4. In proceedings under the Revised Statutes (1 R. S. 125, § 51) to compel an officer whose term has expired to deliver to his successor the books, papers, etc., appertaining to the office, all that the petitioner is required to establish is his election, and that he has duly qualified. *In re Bradley.* 527

5. Questions as to the validity of the election may not be determined in such a proceeding. *Id.*

6. Under the provisions of the statute in relation to town officers (§ 51, chap. 569, Laws of 1890) requiring every person elected to such an office, "before he enters on the duties of his office," and within ten days after notice of his election, to take the prescribed oath of office, and to file the same within eight days thereafter, where the oath is taken and filed by one elected as supervisor, this is an acceptance of the office, and his predecessor thereupon ceases to hold it, and has no further standing as a member of the town board. It is for the other members of the board to pass upon the undertaking of the new member, furnished in compliance with the statutory provision (§ 60) which makes its approval a condition precedent to his right to receive the town moneys, books, etc. *Id.*

7. Where, therefore, in such proceeding it appeared that the applicant had received his certificate of election to the office of supervisor, had filed the oath of office and that his bond had been approved by the town board, and it was objected that illegal ballots had been counted for the applicant, and he had not been elected by a majority of the legal ballots, also that his predecessor had not been notified and was not present at the meeting of the town board when the appli-

cant's undertaking had been approved, *held*, that the objections were untenable, and that the application was properly granted. *Id.*

ORDERS (FOR MONEY OR GOODS).

1. A contractor with the owner of land for the erection of a building thereon executed to C., who had furnished materials, an order upon the owner directing him to pay C. a sum specified, and deduct the same from the amount of the contract. In an action to recover the amount of the order, *held*, that the order amounted to an equitable assignment *pro tanto*; but that, in the absence of due prior notice to the owner of the assignment, he was only liable for the amount remaining unpaid on the contract when the action was brought. *Crouch v. Muller.* 495

2. Defendant was a German who did not understand English; the order was shown to him and described as a note for him to sign for the amount stated therein. *Held*, that this was not due notice. *Id.*

PARTITION.

1. The sole effect of the partition of land, by judgment in an action for that purpose, is to give title in severalty where before it was in common, and to settle and establish the title between the parties and their privies; it does not create title as against strangers where none existed before. *Greenleaf v. B., F. & C. I. R. Co.* 395

2. Where, therefore, in an action of ejectment plaintiffs claimed title under deeds given under a judgment in a partition suit, to which defendants were not parties and had no connection therewith, *held*, that in order to sustain the action, and in the absence of any proof of possession of the land by the parties to the partition suit or their predecessors in interest, plaintiff was bound to show a subsequent possession prior to the possession of defendant; also that mere payment of taxes, claim of title and

assertions of ownership, even when made upon the land, did not show the actual possession which raises the presumption of title sufficient to maintain ejectment.

Id.

PARTNERSHIP.

1. While upon the death of one of two co-partners, the successor has the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and to dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief. *Russell v. McCall.* 437

2. Where the surviving partner has thus misappropriated the assets and an equitable action has been brought against him by the personal representatives of the estate of the deceased partner, and a judgment obtained therein for an accounting and payment of the amount found due the estate, this, unless the amount so found due is paid, is not a bar to an action against others who, by intermeddling with the assets and sharing in the misappropriation, have rendered themselves liable therefor as trustees *de son tort*. Until satisfaction of the judgment it gives the surviving partner no greater rights over the assets than he had before its rendition. *Id.*

3. Each one of the several wrongdoers is severally liable for the full amount of the misappropriation. *Id.*

4. Where, therefore, after judgment against the surviving partner alone, a joint action was brought against him and other wrongdoers who had participated in the misappropriation of the firm assets,

held, that the former judgment was a bar as to him, but was no defense as to those not previously sued. *Id.*

5. In the subsequent action it was decided that the judgment against the surviving partner was conclusive against the plaintiff as to the amount and value of the assets, but was no evidence against the defendants other than said partner. *Held*, no error. *Id.*
6. In the action against the surviving partner it appeared that there was a disputed claim against the firm in favor of one who had shared in the misappropriation of the firm assets, and the amount thereof was required to be deposited in a trust company, to pay such claim if it was established, but no such deposit was in fact made. *Held*, in the subsequent action against the other wrongdoers, that no one of the defendants was entitled to be credited with the amount so ordered to be deposited; that the fact that one of the defendants claimed to be a creditor of the old firm was not a defense, as he could not, by his illegal interference with the assets, pay his claim, nor had he the right to take possession of the property for that purpose. *Id.*
7. The deceased partner died in 1880. In that year the action against the surviving partner was commenced. The litigation was not concluded until the latter part of the year 1886. Early in the year 1888 the action against all the wrongdoers was commenced. *Held*, that a refusal to dismiss the complaint on the ground of inexcusable laches was proper; that the record disclosed reasonable cause for the delay. *Id.*
8. A receiver was appointed in the first action, who sold the remaining firm assets, and by order of the court deposited the proceeds, subject to further directions. In the second action the trial court, instead of rendering an interlocutory judgment and sending it to a referee to inquire as to how much was left of the sum so deposited, over and above expenses,

took the evidence upon that point and directed final judgment. *Held*, no error. *Id.*

PAYMENT.

1. In an action to recover an alleged unliquidated indebtedness, the defendant, under a plea of payment, is entitled to give proof of any valid agreement between the parties which would operate to discharge the debt. *McLaughlin v. Webster.* 76
2. In order to make a money payment a part payment of a debt, so as to take the case out of the operation of the Statute of Limitations, it must appear that the payment was made upon the particular debt, and was accepted by the creditor as such, and also that it was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor that more was due, so that a promise to pay the remainder may be inferred; mere proof of payment, without anything to show on what account or for what reason the money was paid, is of no avail to defeat the operation of the statute. *Crow v. Gleason.* 489

PENAL CODE.

§ 12.	<i>People ex rel. Forsyth v. Ct. of Sessions.</i>	288
292.	<i>People v. Ewer.</i>	129
467.	<i>Hewitt v. Newberger.</i>	538
639.		
654.		

PEOPLE.

— *Action not maintainable by attorney-general in name of People to restrain the commission of a nuisance by a corporation in a city street.*
See People v. E. G. L. Co. 232

PLEADING.

1. In an action against executors to recover the value of services alleged to have been rendered the deceased, *held*, that defendants, under a plea of payment, were

entitled to prove an agreement between plaintiff and the testator that certain devises and bequests to the former in the will of the latter should be in full payment and discharge of any claim for such services, save in case the will failed to be admitted to probate; and that as the claim was unliquidated and of a character that could be legally discharged by such an agreement, and it having been performed by decedent, and the provision made for him in the will accepted by plaintiff, a complete defense to the action was established. *McLaughlin v. Webster.* 76

2. The referee on trial, on application of defendants' counsel, permitted the answer to be amended by alleging the agreement. *Held*, no error; that while the amendment was unnecessary, the referee had power to allow it. (Code Civ. Pro. §§ 721, 722, 723.) *Id.*
3. A demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, cannot be sustained unless it appears that, admitting all the facts alleged, no cause of action whatever is stated. The pleading as against the demurrer will be deemed to allege whatever may be implied from its statements by fair and reasonable intendment, and the demurrer will not be sustained by simply showing that the facts are imperfectly or informally averred; that the complaint lacks definiteness and precision, or that material facts are argumentatively stated. *Kain v. Larkin.* 144
4. Plaintiff's complaint alleged in substance the recovery of judgment by her against one of the defendants and the return of an execution unsatisfied; that after the cause of action accrued, said defendant transferred his property which would be subject to the lien of an execution to his wife, daughter and brother, by instruments set forth; that said transfers were made without consideration and with intent to hinder, delay and defraud the plaintiff. The relief asked was the setting

aside of the transfers and the application of the property to the payment of plaintiff's judgment. At the opening of the case on trial, upon defendants' motion, the court dismissed the complaint on the ground that it did not state sufficient facts to constitute a cause of action. *Held*, error; that it was sufficiently favorable to defendants to consider the question as if presented by general demurrer to the complaint, and so considered the complaint set forth facts sufficient to constitute a cause of action. *Id.*

5. Where a building contract contains a condition requiring an architect's certificate of completion of the contract, before payment of the last installment, it is essential, in an action upon the contract to recover that installment, to allege in the complaint performance of that condition, or set forth facts excusing plaintiff from procuring the certificate. *Weeks v. O'Brien*. 199

6. In order to avail himself of the objection the defendant is not required to present it by demurrer or answer; he may raise it on the trial. (Code Civ. Pro. § 499.) *Id.*

7. In an action upon such a contract a copy thereof was annexed to the complaint which alleged performance, stated the amount unpaid and demanded judgment therefor. The answer denied the complaint and set out as a counterclaim that plaintiff abandoned the contract before completion and that defendant, after due notice under a provision of the contract, authorizing him in such case so to do, completed the building in accordance with the stipulations, at a cost specified, and also had sustained damages by reason of the delay. On the trial plaintiff testified, in detail, as to what he had done under the contract, and proof was given of demand upon the architect for a certificate, which was refused. Defendant claimed a failure to perform the contract in several particulars, and upon cross-examination of plaintiff called out the fact that notice had been served on him under the con-

tract and that defendant had proceeded thereunder to complete the work. At the close of plaintiff's evidence the court dismissed the complaint on the ground that it contained no averment that the architect unreasonably refused a certificate of the completion of the work. *Held*, error; that while it was not too late to then raise the objection, and no application having been made to amend the complaint, it was in the discretion of the court to entertain it, yet by calling out the testimony that defendant had, after notice, proceeded to complete the contract, this opened the issue, and as the provision of the contract under which defendant acted, entitled plaintiff to recover the difference between the last installment and the amount expended by defendant in completing the work, this rendered the certificate unnecessary, and the case should have gone to the jury upon the issue so litigated. *Id.*

8. Under a general denial in an action on contract, defendant may controvert by evidence anything which plaintiff is bound to prove in the first instance to make out his cause of action, and anything he is permitted to prove for that purpose. *Milbank v. Jones*. 340

9. When in such an action plaintiff is permitted to prove a cause of action other than that set forth in the complaint, defendant is entitled to the benefit of any defense he may have to the cause of action established. The pleadings will be regarded as amended so as to conform to plaintiff's proof on the one hand and to cover any proof defendant may offer which answers or defeats the case made against him; and so, defendant is entitled to show that the cause of action was satisfied, extended or modified in such a manner as to defeat any right of action upon it. *Id.*

PLEDGE.

1. Prior to May 8, 1884, plaintiff had deposited with B. & Co., who were bankers and brokers in New York city, 100 shares of corporate stock as security for any indebted-

ness to that firm. On that date B. & Co., without the knowledge or consent of plaintiff, pledged said stock, with other shares of stock belonging to said firm, with S. & Co., as security for a loan. The loan was made subject to the rules of the New York Stock Exchange, of which the member of each firm who negotiated it was a member. The latter firm were *bona fide* pledgees, having no knowledge that B. & Co. were not the owners of all the stock pledged. Plaintiff was not in fact at the time of the pledge equitably indebted to B. & Co. in any sum whatever, and did not thereafter become so indebted. On May 14, 1884, B. & Co. failed, and made an assignment. Plaintiff on that day learning of that fact, and also then learning for the first time that his stock had been so pledged, notified S. & Co. of his interest, and requested a statement of the amount for which his stock was held. S. & Co. refused to give any information, or to recognize plaintiff's rights. S. & Co. on the same day, without notice to plaintiff or B. & Co., and in violation of the rules of the said exchange, sold all the stock so pledged. Plaintiff's stock sold for about \$8,000, and after applying the proceeds of all the stock pledged in payment of the loan, there remained about \$3,000 in the hands of S. & Co. Plaintiff did not learn of the sale of his stock until June 21, 1884, at which time the price of said stock had reached par, and the prices of the other stock sold had so advanced that if they had been held and then sold the proceeds would have paid the loan, leaving plaintiff's stock free from any claim. In an action for conversion S. & Co. claimed the right to apply the balance in their hands upon another debt due them from B. & Co. *Held*, untenable; also, that while S. & Co., as *bona fide* pledgees, were entitled to regard B. & Co. as owners of all the stock pledged until notified of plaintiff's rights, having been so notified prior to the sale, he then stood, with reference to his stock, as surety, with the right to compel them to apply the proceeds of the other stocks before resorting to

his stock; that as to his stock, he had the right to require a sale in accordance with the rules of the stock exchange, and could treat the unlawful sale as a conversion, and after the proceeds of the sale of the other stocks had been applied to the payment of the loan, he was entitled to the highest price which his stock reached within a reasonable time after its illegal sale, and to judgment for that sum, deducting therefrom the balance due S. & Co. after such application; and that as plaintiff did not learn of the sale until after June twenty-first, that was a reasonable time; but *held*, in regard to the other stock sold, plaintiff was not entitled to charge S. & Co. with the highest price because of the unlawful sale, and so long as it sold at its full market value at the time of sale, he could not complain. *Smith v. Satin*. 315

2. Plaintiff's original complaint alleged that the other stocks pledged by B. & Co. sold for enough to pay their debt; that his stock was sold for \$9,000, for which sum he asked judgment. Plaintiff did not know, until after the cause was at issue and referred, of the time, place or manner of sale of his stock, or that it had been sold without demand of payment or notice; he thereafter went to trial; judgment was rendered against him, which was reversed on appeal. Plaintiff thereupon moved to be allowed to amend his complaint by setting up the illegal sale and asking damages; this was granted upon condition of payment of all of defendants' costs, which condition was accepted and the complaint amended. Defendants claimed that plaintiff had elected, by the form of his original complaint, to affirm the sale. *Held*, untenable; that plaintiff, having proceeded originally in ignorance of the facts, could not be held as having conclusively ratified the illegal sale; and that, under the circumstances, he did not lose the right to repudiate the sale by proceeding to trial under the original complaint. *Id.*

3. The certificate of plaintiff's stock was issued in his name; the power

of attorney to transfer was a detached paper, and plaintiff's signature thereto was not acknowledged as required by the rules of the stock exchange. *Held*, that S. & Co. were not thereby charged with any notice of defect of title on the part of their pledgors. *Id.*

POLICE.

The provision of the Penal Code (§ 292) declaring a person guilty of a misdemeanor who exhibits a female child under sixteen years of age, or who, having the care of such a child as parent, etc., consents to her employment or exhibition as "a dancer * * * or in a theatrical exhibition, or in any * * * exhibition dangerous or injurious to the life, limb, health or morals of the child," is not violative of any right secured by the Constitution, but is within the police power of the legislature; it is for that body to determine as to whether any or all such exhibitions are prejudicial to the interests of the child and contrary to the policy of the state to permit. *People v. Ever.* 129

POSSESSION.

1. Where in an action of ejectment plaintiffs claimed title under deeds given under a judgment in a partition suit, to which defendants were not parties and had no connection therewith, *held*, that in order to sustain the action, and in the absence of any proof of possession of the land by parties to the partition suit or their predecessors in interest, plaintiff was bound to show a subsequent possession prior to the possession of defendant; also that mere payment of taxes, claim of title and assertions of ownership, even when made upon the land, did not show the actual possession which raises the presumption of title sufficient to maintain ejectment. *Greenleaf v. B., F. & C. I. R. Co.* 395

2. Also *held*, that admissions to the effect that plaintiffs owned the land, made by one from whom de-

fendants took a deed, when neither he nor plaintiffs were in possession, did not bind the defendants who subsequently took possession claiming to be the owners, and who relied upon their possession as sufficient evidence of ownership as against plaintiffs. *Id.*

POWERS.

1. Where a grantee of a life estate takes also by his deed a power to alien in fee to any person by means of a will, and no person other than the grantee of the power has, by the terms of its creation, any interest in its execution, the power is a general beneficial one. *Hume v. Randall.* 499
2. In an action by the vendor to enforce specific performance of a contract for the purchase and sale of land, plaintiff claimed title under a deed with covenant of warranty, which contained conditions substantially as follows: The grantees shall have an equal interest in the property, and shall control and direct the same after the death of the grantor; upon the death of one of the grantees the other to have such control during life; neither "shall have the right to convey by deed" without the consent of the grantor, but it may be arranged to be disposed of by will by the survivor, or by mutual will of the grantees, to take effect after the death of both. The habendum clause was to the grantees, their "heirs and assigns forever." The grantor was dead at the date of the deed from the grantees to plaintiff. *Held*, that said grantees had power to alien their life estate after the death of their grantor; and so, that their conveyance with warranty conveyed the fee. (1 R. S. 732, 733, §§ 81-84.) *Id.*

POWER OF ATTORNEY.

Plaintiff executed to her half-brother C., defendant's testator, a power of attorney, authorizing him to collect the amount of an insurance policy held by her upon the life of her deceased husband. C. col-

lected the amount, and without the consent of plaintiff appropriated it to his own use, and never paid the same or any part thereof or accounted to her therefor. On reference of a claim for the amount it appeared that for more than ten years before the presentation of the claim, plaintiff supposed and believed C. had received the money, but that she never demanded the same. *Held*, that the claim was properly dismissed on the ground that it was barred by the Statute of Limitations; that no trust or fiduciary relation existed between the parties growing out of their relationship, which required a demand or actual knowledge of the facts by plaintiff before the right of action accrued; and that the only legal relation between the parties was that of debtor and creditor. *Wood v. Young.* 211

PRACTICE.

1. While after appeal to this court, in all matters pertaining to the appeal itself and to the proper hearing of, as well as all applications which by statute may be made to this court, it has jurisdiction, as to all other applications the case is to be regarded as still pending in the court of original jurisdiction, and such applications should be made to that court. *People ex rel. v. Bd. Edn.* 86

2. Where, therefore, after appeal to this court the appellant's attorneys at her request substituted another in their place, *held*, that a motion for order directing the former attorneys to turn over the papers in the case to the substituted attorney was not properly made here, but should have been made in the court below. *Id.*

See APPEAL.
MOTIONS AND ORDERS.
PLEADING.
TRIAL.

PRESUMPTIONS.

1. No presumption that state authority over the navigable waters

of the state is excluded arises from the mere fact that congress has legislated; there must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject. *People v. Welch.* 266

2. In the plaintiff's chain of title, proved in an action to remove a cloud on title, was a deed to three persons, who were described as trustees of a land association. It did not appear that the association was incorporated, or capable as such of taking a legal title. *Held*, it was to be assumed that the association was a partnership of individuals, of which the grantees were members, holding the legal title for the benefit of themselves and others, and so they were not mere trustees, holding simply a nominal title, and the provisions of the Revised Statutes (1 R. S. 728, §§ 49-58), taking away such a title and vesting it in the beneficiary, did not apply; and, therefore, whether the deed was to be regarded as one to the grantees named individually, or as a conveyance for their benefit and that of others, they had authority to sell and convey a good title. *King v. Townsend.* 358

— When it may not be presumed that the salary of an officer of an insurance company is to continue where the company has re-insured all its risks for the purpose of closing its business. *See Simonson v. N. Y. C. Ins. Co.* 12

PRINCIPAL AND AGENT.

— When act of bank cashier in drawing draft as cashier upon a correspondent bank in payment of his individual debt binding upon his bank. *See Goshen Nat. Bank v. State.* 379

See BROKER.

PROMISE.

See CONTRACT.

PUBLIC POLICY.

The commissions of an executor, until ascertained and liquidated in

the manner prescribed by law, are not subject to his disposal, but upon grounds of public policy are unassignable. *In re Worthington*. 9

QUESTIONS OF LAW AND FACT.

1. While, in an action for negligence, the absence of negligence on the part of the plaintiff, contributing to the injury, must be shown by him affirmatively, this may be done by circumstantial as well as direct evidence, and if different conclusions may be drawn from the circumstances proved, the question of negligence is one of fact for the jury or a trial court. *Chisholm v. State*. 246

2. When question as to whether a transaction is a sale or bailment is one of fact for a jury. *Crosby v. Prest., etc., D. & H. C. Co.* 589

—When question of mistake, one of fact.
See Haviland v. Willets. 85

RAILROAD CORPORATIONS.

1. In an action instituted in 1889 to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interests of her co-tenants, who also assigned to her their rights of action and claims for damages. Plaintiff claimed for damages sustained prior to March, 1887, as well as since. On the trial defendants moved that the action be severed and that the claim for damages acquired by assignment be sent to a jury; this was denied. *Held*, no error; that if the court decided that the claim for equitable relief was well founded, it was within its discretion to assess all the damages sustained to which plaintiff was entitled, whether belonging to her as owner or acquired by assign-

ment, and that defendants had no absolute right to have them determined by a jury. *Hunter v. Manhattan R. Co.* 281

2. The trial judge found that prior to the commencement of the action all the parties who were co-tenants with plaintiff duly assigned to her, for a valuable consideration, all their rights of action by reason of the diminution in value of the premises or the rental value by reason of the construction and maintenance of the road. To this finding the defendants excepted, "and separately to so much thereof as finds that the plaintiff ever took from her co-tenants an assignment for valuable consideration of any rights of action as therein stated." Upon appeal it was claimed by defendants that there was no evidence of assignment by certain of the former tenants in common. *Held*, that the point was not presented by the exception and so could not be considered. *Id.*

3. In such an action expert evidence is admissible to show the general effects caused by the maintenance and operation of the road upon abutting and neighboring properties. *Id.*

4. Where in proceedings under the General Railroad Act (Chap. 140, Laws of 1850, as amended) to condemn lands for railroad purposes, an award of commissioners is reversed and a new appraisal directed, and upon a second hearing a new award is made, the second report "is final and conclusive on all the parties interested (§ 18 of said act, as amended by chap. 198, Laws of 1876), and no appeal lies to this court from an order of General Term affirming an order of Special Term confirming the second report. *In re S. B. R. R. Co.* 532

RATIFICATION.

—When the owner of stock pledged to secure indebtedness brought action to recover the amount due on sale of stock in ignorance that the sale was unlawful, and upon discovery of this fact was permitted to

amend his complaint so as to make the action one for conversion, held, that the bringing of the action in its original form was not an election to ratify the illegal sale.

See Smith v. Savin.

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RE-ARGUMENT.

It is not to be assumed because a fact appearing in the record or authority cited on argument in this court which is deemed important by counsel, is not noticed or commented on in the opinion that it has not been considered and due weight given to it in arriving at the decision, and the omission to notice it is not ground for a motion for re-argument. *Dam-mert v. Osborn.*

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REFERENCE.

1. The complaint herein alleged that the parties were associated in business under an agreement "in the nature of a general partnership or quasi partnership," by the terms of which plaintiff was entitled to draw a sum specified weekly, and was also to have a specified percentage of the net profits. The relief asked was an accounting and judgment for the amount found due. The answer alleged that the relation of the parties was that of employer and employee, plaintiff being entitled for his services to a weekly sum and a share of the profits, but a less percentage than that claimed in the complaint. Upon application for a reference it appeared that the accounting would require the examination of many transactions and items and that no difficult question of law was involved. *Held*, that in either view of the relation of the parties an order of reference was proper. *Rowland v. Rowland.*

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2. Plaintiff set forth in his complaint a settlement between the parties which he averred was induced by fraudulent representation on the part of defendant. *Held*, that this did not affect the jurisdiction of the court to refer the case. *Id.*

RELEASE.

1. H. died leaving the plaintiff his sole heir and next of kin him surviving, and leaving a will by which he gave a legacy to plaintiff, and his residuary estate to two persons named, one-half to each. One of these died before the testator, leaving two children; the other was executor under the will and the sole surviving executor. Plaintiff was, at the testator's death, seventy-three years of age. Both he and the executor believed at the time of the reading of the will that the share of the residuary legatee who had died went to his children. The executor then proposed to give plaintiff a sum specified, he to release all his interest in the estate. Before, however, an agreement was perfected, the former discovered that such legacy had lapsed and that the share went to plaintiff. Without disclosing this the executor drew up an agreement of release which contained no statement of the facts; this plaintiff signed. Subsequently the executor took plaintiff to his counsel, and there plaintiff executed a more formal instrument, which recited the death of said residuary legatee and the desire and intention of plaintiff to relinquish to the children of the deceased legatee all the rights and interests acquired by him as heir at law and next of kin, and by which, in consideration of payment of the sum agreed upon, he released and discharged such interests and authorized payment thereof to said children. In an action to set aside said release it appeared that it was read at the time it was executed, and that the counsel stated, after the release was signed, that by the lapse of the legacy, the ownership thereof vested in plaintiff; this statement was couched in legal terms, and plaintiff testified that he did not hear the statement either of counsel or as read. *Held*, that a question of fact was presented, and this court could not dispute a finding that plaintiff did not know his legal rights when he executed the release; and that, as the evidence showed a studious

concealment from plaintiff by the executor, in whose position and ability the former reposed some confidence, of the precise point essential to his free and intelligent action, it was competent for a court of equity to cancel the release, so far as lawful payments had not been made under it.
Hariland v. Willets. 35

2. The executor died, and two days thereafter plaintiff was fully advised of his legal rights; for three years he remained silent without revoking the release, giving any notice of change of intention, or making any complaint, although knowing that the estate was being administered in accordance with it. During the three years large sums were paid to said children out of the estate by the administrators with the will annexed. *Held*, that plaintiff was estopped from recovering back said sums either from said administrators or the persons to whom they were paid; but was entitled to an accounting and to payment of the amount of said residuary share, less the amount paid to plaintiff over and above his legacy and the sums so paid to the children of the deceased legatee. *Id.*

3. Where an executor and executrix who were legatees under the will executed an instrument stating that their accounts were settled "as between themselves, and as between themselves and said estate," and mutually releasing each other from every liability "by reason of anything relating to the estate or the doings or proceedings of either of them as executrix or executor of said will," *held*, that the release was a bar to proceedings instituted by the executor before the surrogate to compel the executrix to account. Also, that the effect of the instrument as a bar was not affected by the fact that there was an infant interested in the estate; that the release, while it stands, was effectual as a bar under all circumstances as between the executor and executrix. *In re Pruyn.* 544

RELIGIOUS CORPORATIONS.

Plaintiff, a corporation incorporated for camp meeting and religious purposes, and owning lands for those purposes, adopted a constitution which gave to its trustees the general oversight of all the business of the association, and provided for the election by them of an executive committee, which should have power to act for them during the interim of their regular meetings, and also have general oversight of all the interests of the camp meeting, and should arrange the prices for ground rents and other privileges. Plaintiff leased two lots upon the grounds of said corporation; each lease was for the term of ninety-nine years, and contained conditions to the effect that it was "subject to all the rules and regulations which may from time to time be adopted and promulgated" by plaintiff for the government of its grounds, which were declared to be a part of the lease as if incorporated therein. These leases were assigned to plaintiff, who erected a store on the demised premises. Plaintiff's executive committee thereafter adopted certain rules and regulations, copies of which were posted in public places, distributed among the cottages on the grounds and received general recognition by the association, providing, among other things, that goods or merchandise should not be sold on any of the lots leased by the association without a license or permission being first obtained from its officers. Said executive committee gave to defendant a permit to conduct a store on his lots for the term of five years upon payment of a sum specified annually; after the first year defendant refused to pay the specified sum, and continued to sell goods although notified by plaintiff's superintendent to desist from so doing without a license. In an action to restrain defendant from selling any goods on the lots without having first obtained a license, *held*, that the executive committee had power to enact said rules and regulations; that a finding that they were reasonable and proper was justified; that the con-

ditions in the leases were valid as between the parties and were binding upon defendant as assignee; that plaintiff was entitled to the aid of a court of equity to compel defendant to observe said conditions, and so that a judgment restraining him from selling any goods or merchandise upon the lots without first obtaining a license was proper. *Round Lake Assn. v. Kellogg.* 348

SALARY.

S., plaintiff's testator, was, prior to September 27, 1881, defendant's president and principal manager; his salary was \$5,000 per annum. On that date an agreement, negotiated by S., was entered into between defendant and another insurance company, by which the latter agreed to re-insure all the risks of the former, it being desirable, as the agreement recited, to retire from business. Defendant agreed to continue in active business until October 1, 1881, and thereafter at the risk and expense, and on account, of the other company, which then agreed to assume, and defendant agreed to assign to it, the lease of its offices. In an action to recover salary after October thirty-first, up to which time S. had drawn it, it appeared that at the date of the execution of said contract, S., by written agreement, entered into the employment of the other company at a salary of \$7,500 and commissions, he agreeing to devote his entire time to its service, unless specially authorized to undertake other duties. S. did not sign or request any check for his salary after October, and made no claim therefor. At a regular meeting of defendant's directors, S. proposed that the salary of its secretary, which was fixed at the same time as his own, should, until its business was wound up, be paid one-half by it, and one-half by the other company. Evidence was given of the rendition of some services by S. for defendant after October, and up to the time of his death, which services were mostly of a formal character, and such as he was bound to render under his

contract with the other company. *Held*, that in the absence of evidence of an agreement or understanding that the salary of S. was to continue, it could not be presumed; and that the action was not maintainable. *Simonsen v. N. Y. C. Ins. Co.* 13

SALES.

1. Plaintiff through a broker sold to defendant certain parcels of canary seed described in the broker's note as to each parcel as "March steamer shipment from Turkey," the name of the steamer being given. After stating the price and that the seed was to be paid for within a timespecified from "date of delivery on dock in New York," each note contained this clause: "Goods to be taken from dock on arrival of steamer when ready for delivery." The parcels were shipped by the steamer named to Liverpool, and there transhipped to another steamer which brought them to New York, where they were tendered to defendants, who refused to accept solely on the ground that the seed was not brought by the steamer named direct to New York. On trial of an action to recover damages plaintiff offered to prove that at the time of sale there was not and never had been freight steamers sailing direct from Turkey to New York, and that the invariable custom was to carry goods to Liverpool, and there transfer them to a steamer for New York. This evidence was excluded. *Held*, error; that the broker's notes did not in explicit terms require a shipment direct in the same steamer from Turkey to New York; that while the steamer of shipment was identified that of arrival was not, and the language of the contract admitted of a doubt as to whether the intent was that both were to be the same, and to solve this doubt the evidence was proper. *Luigi v. Rosenstein.* 414
2. When question as to whether a transaction is a sale or bailment is one of fact for a jury. *Crosby v. Prest., etc., D. & H. C. Co.* 539

See EXECUTION.

SCHOOL COMMISSIONERS.

1. A school commissioner is a constitutional officer "elected by the People," and so, under the State Constitution prescribing the qualification of voters (Art. 2, § 1), may only be voted for by "male citizens." *In re Gage.* 112
2. Accordingly *held*, that the act of 1892 (Chap. 214, Laws of 1892), conferring upon women the right to vote for school commissioners, is unconstitutional. *Id.*

SENTENCE.

1. A statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, after conviction, is not violative of the provision of the State Constitution (§ 5, art. 4) giving to the governor the power to grant reprieves and pardons. *People ex rel. v. Ct. of Sessions.* 288
2. The distinction between the two powers pointed out. *Id.*
3. *It seems*, however, the legislature cannot authorize such courts to so limit the exercise of their discretion to inflict punishment when deemed proper, in a case where sentence has been suspended, as to make such exercise dependent upon compliance on the part of the person convicted with some condition that will require the court to try a question of fact before it can impose the punishment. *Id.*
4. The provision of the Penal Code (§ 12) as amended in 1893 (Chap. 379, Laws of 1893), which declares that a criminal court, in certain cases, "may, in its discretion, suspend sentence during the good behavior of the person convicted," does not express such a condition, and does not preclude the court from passing the proper sentence whenever it appears to it to be proper. *Id.*

SERVICE (AND PROOF OF).

1. In an action against joint debtors, service of summons on one author-

izes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action. *Yerkes v. McRadden.* 136

2. So, an attachment issued in an action against several upon a joint liability, may be executed by seizure of the joint property, although the summons is served on but one of the defendants within that time, or if commenced is not continued to completion. *Id.*

3. Accordingly *held*, where an attachment was issued against the members of a firm as non-residents, under which the firm property was levied upon, and a service of summons by publication was commenced, but was not completed, in one of the designated newspapers within the thirty days, but personal service was made on one of the defendants, that the lien of the attachment was not lost by the failure to complete the service by publication, nor could the attachment be vacated as against any of the defendants. *Id.*

SPECIAL PROCEEDINGS.

1. In proceedings under the Revised Statutes (1 R. S. 125, § 51) to compel an officer whose term has expired to deliver to his successor the books, papers, etc., appertaining to the office, all that the petitioner is required to establish is his election and that he has duly qualified. *In re Bradley.* 527
2. Questions as to the validity of the election may not be determined in such a proceeding. *Id.*
3. Under the provisions of the statute in relation to town officers (§ 51, chap. 569, Laws of 1890) requiring every person elected to such an office, "before he enters on the duties of his office," and within ten days after notice of his election, to take the prescribed oath of office, and to file the same within eight days thereafter, where the oath is taken and filed

by one elected as supervisor, this is an acceptance of the office, and his predecessor thereupon ceases to hold it, and has no further standing as a member of the town board. It is for the other members of the board to pass upon the undertaking of the new member, furnished in compliance with the the statutory provision (§ 60) which makes its approval a condition precedent to his right to receive the town moneys, books, etc. *Id.*

4. Where, therefore, in such proceeding it appeared that the applicant had received his certificate of election to the office of supervisor, had filed the oath of office and that his bond had been approved by the town board, and it was objected that illegal ballots had been counted for the applicant, and he had not been elected by a majority of the legal ballots, also that his predecessor had not been notified and was not present at the meeting of the town board when the applicant's undertaking had been approved, *held*, that the objections were untenable, and that the application was properly granted. *Id.*

SPECIFIC PERFORMANCE.

1. While it is one of the pre-requisites to the specific performance of an alleged parol agreement for the purchase and sale of land that the agreement shall be clearly proved and certain as to its terms, this rule is to be observed and enforced in the courts below which deal with the facts, and when such an agreement has been there found upon conflicting evidence, and is certain in its terms as found, it must be taken as clearly established within the rule, and the findings are conclusive here. *Dunckel v. Dunckel.* 427
2. The granting of relief by way of specific performance of such a contract is largely in the discretion of an equity court, and where it is granted without violating any fixed rule of equity, the discretion is not reviewable here. *Id.*

3. While, as a general rule, mere payment of the purchase price, under such a contract, is not sufficient to authorize specific performance, where possession has also been taken by the purchaser, the contract will be specifically enforced and to take the case out of this rule the circumstances must be peculiar and exceptional. *Id.*

4. In an action to compel specific performance of such a contract these facts were found in substance: During the lifetime of J., plaintiff's husband, who was defendant's son, defendant purchased the premises in question as a home for J., with the promise that he would convey the same to J. or some one of his family without the payment of anything therefor. Relying upon this agreement, J. made and paid for permanent improvements to the amount of \$2,800 with defendant's knowledge. After the death of J. defendant agreed that if plaintiff would pay certain notes of J., on which defendant was liable as indorser, he would give her a lease of the premises for life, or pay what J. "had put in the place." In reliance upon this agreement, plaintiff paid said notes, and in so doing paid more than she was obliged to pay as executrix of her husband's will. It appeared that said agreement was made before the probate of the will, and when both parties supposed his estate to be insufficient to pay his debts. Plaintiff thereupon had the will probated, and qualified as executrix. She surrendered to defendant the notes when paid, and for three years remained in possession of the premises under the agreement. *Held*, that a judgment requiring defendant to execute to plaintiff a lease for life was proper. *Id.*

5. The case was twice tried. Upon the first trial the jury to whom was submitted the questions of fact answered in the negative the questions as to the promise of defendant to J., and as to improvements made by the latter. These findings were adopted by the court and were not disturbed by the reversal of the judgment upon

appeal. Defendant objected to the submission of said questions to the jury on the second trial and to all evidence in reference thereto. *Held*, that the verdict of the jury answering these questions in the affirmative on the second trial and the findings objected to were entirely harmless as no relief was based thereon, and they in no way entered into or affected the judgment; also, that as by the reversal the whole case was thrown open for trial of the issue as to the agreement with plaintiff, the circumstances attending the original purchase, possession and improvements made by the son were properly put in evidence. *Id.*

6. It was objected on appeal that the judgment should have been in the alternative, requiring defendant to give the lease, or pay the \$2,800 expended by J. There was no objection in the record presenting the point and no request that the judgment should be in the alternative. It appeared by the record that plaintiff was willing to take in lieu of the lease the amount so paid, and upon the argument her counsel offered to allow an amendment of the judgment in this respect if desired by defendant. *Held*, that the objection was untenable; that it might properly be assumed that defendant assented to the form of the judgment. *Id.*

7. In an action by the vendor to enforce specific performance of a contract for the purchase and sale of land, plaintiff claimed title under a deed with covenant of warranty, which contained conditions substantially as follows: The grantees shall have an equal interest in the property, and shall control and direct the same after the death of the grantor; upon the death of one of the grantees the other to have such control during life; neither "shall have the right to convey by deed" without the consent of the grantor, but it may be arranged to be disposed of by will by the survivor, or by mutual will of the grantees, to take effect after the death of both. The habendum clause was to the grantees, their

"heirs and assigns forever." The grantor was dead at the date of the deed from the grantees to plaintiff. *Held*, that said grantees had power to alien their life estate after the death of their grantor; and so, that their conveyance with warranty conveyed the fee. (1 R. S. 732, 733, §§ 81-84.) *Hume v. Randall*, 499

STARE DECISIS.

See FORMER ADJUDICATION.

STATE.

The state erected a new highway bridge over the Erie canal, which, being wider than the old one, rendered a widening of the approaches necessary. The approach at one end was not graded up to the bridge for some days, and thus a hole was left which was unsafe and dangerous, without proper guards. No guards or lights were furnished, and plaintiff, in crossing the bridge on a very dark night, stepped into the hole and was injured. Upon a claim presented to the Board of Claims it appeared that plaintiff was not aware of the dangerous condition of the approach. *Held*, that the facts showed negligence on the part of the state and justified a finding that there was no contributory negligence on the part of the claimant. *Chisholm v. State*, 246

— Action not maintainable by attorney-general in name of People, to restrain the commission of a nuisance by a corporation in a city street. *See People v. E. G. L. Co.* 232

STATE COMPTROLLER.

See COMPTROLLER.

STATUTES.

— 1 R. S. 603, § 4.
See Stonebridge v. Perkins, 1.
 — § 474, chap. 410, Laws of 1882.
See McKenzie v. Hutton, 6.
 — Chap. 37, Laws of 1855.
See People ex rel. v. Barker, 118.

- § 1, chap. 687, *Laws of 1872.*
- § 4, chap. 169, *Laws of 1877.*
- Chap. 583, *Laws of 1888.*
- See *White v. Inebriates' Home*, 123.
- Chap. 646, *Laws of 1873.*
- § 2, chap. 403, *Laws of 1892.*
- § 40, chap. 401, *Laws of 1892.*
- See *Quintan v. Welch*, 158.
- § 3, chap. 456, *Laws of 1857.*
- See *People ex rel. v. Barker*, 196.
- Chap. 6, *Laws of 1855.*
- See *Ketcham v. Newman*, 205.
- Chap. 488, *Laws of 1886.*
- See *Moore v. Hanover Fire Ins. Co.*, 219.
- §§ 238, 240, chap. 488, *Laws of 1892.*
- Chap. 578, *Laws of 1893.*
- See *People ex rel. v. Crennan*, 239.
- 1 R. S. 589, § 1.
- § 13, chap. 40, *Laws of 1848.*
- See *People ex rel. v. Barker*, 251.
- U. S. R. S. §§ 711, 5328, 5344.
- See *People v. Welch*, 236.
- Chap. 379, *Laws of 1893.*
- See *People ex rel. v. Court of Sessions*, 288.
- Chap. 132, *Laws of 1835.*
- See *In re Adams*, 297.
- § 11, tit. 13, chap. 298, *Laws of 1883.*
- Chap. 398, *Laws of 1888.*
- See *People ex rel. v. Maher*, 330.
- 1 R. S. 728, §§ 49-58.
- §§ 13-16, chap. 381, *Laws of 1871.*
- See *King v. Turnshend*, 358.
- 1 R. S. 390, §§ 9 et seq.
- Chap. 620, *Laws of 1873.*
- See *Sanders v. Downs*, 422.
- Chap. 542, *Laws of 1889.*
- Chap. 463, *Laws of 1889.*
- See *People ex rel. v. Wemple*, 471.
- § 10, chap. 398, *Laws of 1857.*
- See *People ex rel. Pratt Institute v. Board of Assessors*, 476.
- § 1, chap. 399, *Laws of 1892.*
- See *In re Merriam*, 479.
- 1 R. S. 125, § 51.
- § 51, chap. 569, *Laws of 1890.*
- See *In re Bradley*, 527.
- Chap. 140, *Laws of 1850.*
- § 18, chap. 198, *Laws of 1876.*
- See *In re S. B. R. R. Co.* 532.

See ACTS OF CONGRESS.
CIVIL DAMAGE ACT.
CONSTITUTIONAL LAW.
LIMITATIONS (STATUTE OF).

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

STIPULATION.

— *As to effect of stipulation for judgment absolute in case of affirmance on appeal from order granting a new trial.*

See *Rose v. Hawley*.

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STOCK.

1. Prior to May 8, 1884, plaintiff had deposited with B. & Co., who were bankers and brokers in New York city, 100 shares of corporate stock as security for any indebtedness to that firm. On that date B. & Co., without the knowledge or consent of plaintiff, pledged said stock, with other shares of stock belonging to said firm, with S. & Co. as security for a loan. The loan was made subject to the rules of the New York Stock Exchange, of which the member of each firm who negotiated it was a member. The latter firm were *bona fide* pledgees, having no knowledge that B. & Co. were not the owners of all the stock pledged. Plaintiff was not, in fact, at the time of the pledge equitably indebted to B. & Co. in any sum whatever, and did not thereafter become so indebted. On May 14, 1884, B. & Co. failed, and made an assignment. Plaintiff on that day learning of that fact, and also then learning for the first time that his stock had been so pledged, notified S. & Co. of his interest, and requested a statement of the amount for which his stock was held. S. & Co. refused to give any information, or to recognize plaintiff's rights. S. & Co. on the same day, without notice to plaintiff or B. & Co., and in violation of the rules of said Exchange, sold all the stock so pledged. Plaintiff's stock sold for about \$8,000, and after applying the proceeds of all the stock pledged in payment of the loan, there remained about \$3,000 in the hands of S. & Co. Plaintiff did not learn of the sale of his stock until June 21, 1884, at which time the price of said stock had reached par, and the prices of the other stock sold had so advanced that if they had been held and then sold the proceeds would have

paid the loan, leaving plaintiff's stock free from any claim. In an action for conversion S. & Co. claimed the right to apply the balance in their hands upon another debt due them from B. & Co. *Held*, untenable; also, that while S. & Co., as *bona fide* pledgees, were entitled to regard B. & Co. as owners of all the stock pledged until notified of plaintiff's rights, having been so notified prior to the sale, he then stood with reference to his stock, as surety, with the right to compel them to apply the proceeds of the other stocks before resorting to his stock; that as to his stock, he had the right to require a sale in accordance with the rules of the Stock Exchange, and could treat the unlawful sale as a conversion, and after the proceeds of the sale of the other stocks had been applied to the payment of the loan, he was entitled to the highest price which his stock reached within a reasonable time after its illegal sale, and to judgment for that sum, deducting therefrom the balance due S. & Co. after such application; and that as plaintiff did not learn of the sale until after June twenty-first, that was a reasonable time; but *held*, in regard to the other stock sold, plaintiff was not entitled to charge S. & Co. with the highest price because of the unlawful sale, and so long as it sold at its full market value at the time of sale, he could not complain. *Smith v. Savin*. 315

2. Plaintiff's original complaint alleged that the other stocks pledged by B. & Co. sold for enough to pay their debt; that his stock was sold for \$9,000, for which sum he asked judgment. Plaintiff did not know, until after the cause was at issue and referred, of the time, place or manner of sale of his stock, or that it had been sold without demand of payment or notice; he thereafter went to trial; judgment was rendered against him, which was reversed on appeal. Plaintiff thereupon moved to be allowed to amend his complaint by setting up the illegal sale and asking damages; this was granted upon condition of payment of all of defendants' costs,

which condition was accepted and the complaint amended. Defendants claimed that plaintiff had elected, by the form of his original complaint, to affirm the sale. *Held*, untenable; that plaintiff, having proceeded originally in ignorance of the facts, could not be held as having conclusively ratified the illegal sale; and that, under the circumstances, he did not lose the right to repudiate the sale by proceeding to trial under the original complaint. *Id.*

3. The certificate of plaintiff's stock was issued in his name; the power of attorney to transfer was a detached paper, and plaintiff's signature thereto was not acknowledged as required by the rules of the Stock Exchange. *Held*, that S. & Co. were not thereby charged with any notice of defect of title on the part of their pledgers. *Id.*

STOCK BROKERS.

1. Where a broker who had purchased stock for a customer on a margin, sold it without previous notice to the customer, and thereafter presented an account to the latter showing the sale and a resultant loss, and the latter, without objection as to the manner of sale, promised to pay the balance shown by the account to be due, *held*, that he thereby waived the right to notice, and recognized and ratified the sale made. *Gillett v. Whiting*. 71
2. In an action by a stock broker to recover a balance alleged to be due from a customer, where an unauthorized sale was claimed, plaintiff proved the service of an account showing the sale as made and a promise of defendant to pay the balance shown to be due, although declaring that he knew plaintiff had violated his contract by making the sale. The court was requested, but refused, to charge that, "to make defendant liable for a ratification of an unlawful sale, it must appear to the satisfaction of the jury that he knew his legal rights." *Held*, no error. *Id.*

3. Defendant, on cross-examination of plaintiff, for the purpose of discrediting the alleged purchases, sought to follow through plaintiff's books, not only the transactions in question, but his dealings with other customers. The court allowed this, except as to the names of the other customers. *Held*, that the limitation was within the discretion of the court; that the discretion was reasonably exercised; and so, there was no error. *Id.*

4. It was shown what books were kept by plaintiff. Defendant offered prove by experts what books were usually kept by stock brokers; this was excluded. *Held*, no error. *Id.*

STOCKHOLDER.

Where a stock broker sells, without due notice, stock purchased by him on a margin for a customer, he does not thereby, as matter of law, extinguish all claim against the customer for the advance made; the customer is simply entitled to be allowed as damages the difference between the price for which the stock was sold and its market price then or within such reasonable time after notice of sale as would have enabled him to replace it in case such market price exceeded the price realized. *Minor v. Beveridge.* 399

STREETS.

See HIGHWAYS.

SUFFOLK (COUNTY OF).

As under the provisions of the act of 1873, in relation to the collection of taxes in the county of Suffolk (Chap. 620, Laws of 1873), the county treasurer's deed on sale of land for unpaid taxes is made conclusive evidence that the sale was regular, and presumptive evidence of the regularity of all prior proceedings, where such proceedings are, in fact, void an action to cancel the deed, as a cloud on title, is

maintainable. *Sanders v. Downs.* 422

SUMMONS.

1. In an action against joint debtors, service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action. *Yerkes v. McFadden.* 136

2. So, an attachment issued in an action against several upon a joint liability, may be executed by seizure of the joint property, although the summons is served on but one of the defendants within the time prescribed, and no service by publication is commenced within that time, or if commenced is not continued to completion. *Id.*

3. Accordingly *held*, where an attachment was issued against the members of a firm as non-residents, under which the firm property was levied upon, and a service of summons by publication was commenced, but was not completed, in one of the designated newspapers within the thirty days, but personal service was made on one of the defendants, that the lien of the attachment was not lost by the failure to complete the service by publication, nor could the attachment be vacated as against any of the defendants. *Id.*

SUPERVISORS.

1. Under the provisions of the statute in relation to town officers (§ 51, chap. 569, Laws of 1890) requiring every person elected to such an office, "before he enters on the duties of his office," and within ten days after notice of his election, to take the prescribed oath of office, and to file the same within eight days thereafter, where the oath is taken and filed by one elected as supervisor, this is an acceptance of the office, and his predecessor thereupon ceases to hold it, and has no further standing as a member of the town

board. It is for the other members of the board to pass upon the undertaking of the new member, furnished in compliance with the statutory provision (§ 60) which makes its approval a condition precedent to his right to receive the town moneys, books, etc. *In re Bradley.* 527

2. Where, therefore, in such proceeding it appeared that the applicant had received his certificate of election to the office of supervisor, had filed the oath of office and that his bond had been approved by the town board, and it was objected that illegal ballots had been counted for the applicant, and he had not been elected by a majority of the legal ballots, also that his predecessor had not been notified and was not present at the meeting of the town board when the appellant's undertaking had been approved, *held*, that the objections were untenable, and that the application was properly granted. *Id.*

SURROGATE'S COURT.

1. The provision of the Code of Civil Procedure (§ 2622) requiring a surrogate, before admitting a will to probate, to "inquire particularly into all the facts and circumstances," and that he "must be satisfied of the genuineness of the will and the validity of its execution," applies equally to wills of real and of personal property, and the same proof is required as to each upon the questions stated. *In re Bartholick.* 166
2. When, upon presentation for probate of an instrument purporting to be a will of real and personal property, the question as to its genuineness and the validity of its execution is properly presented by a person having the right to raise it in some capacity, it is the right and duty of the surrogate to wholly refuse probate, if he becomes satisfied and finds that the testator had not mental capacity to make a will, or that the instrument offered for probate was obtained by fraud and undue influence; he is not re-

quired to admit it as a will of personal property, although the only person contesting the probate is interested solely as heir at law, and is not one of the next of kin. *Id.*

3. Upon presentation of such an instrument for probate the only contestant was K., a grandniece of the testator, who filed objections charging fraud, undue influence and mental incapacity; all others interested acquiesced in its probate. The surrogate decided in favor of the probate, and the instrument was proved as a will of real and personal estate. K. alone appealed; she described herself in the notice of appeal as an heir at law, but appealed "from each and every part of the decree." The General Term reversed the decree, stating that the reversal was on a question of fact, and ordered a new trial before a jury, upon the questions as to whether the testator was of unsound mind when the will was executed, and whether it was procured by undue influence, fraud or deceit. Both these questions the jury, upon sufficient evidence, answered in the affirmative. The surrogate was requested to confine his decree to a refusal to admit the instrument to probate as a will of real estate, leaving the probate to stand as a will of personalty; this he refused, and entered a decree adjudging it to be wholly invalid, and revoking the former probate. *Held*, that this court, on appeal from an order of General Term affirming the last decree, had no power to review the first order of that court; and that as that order reversed the whole decree admitting the will to probate, and as the surrogate had found the will not duly executed, this prevented its probate for any purpose whatever. *Id.*
4. The surrogate attached to the last decree, but not as forming part of it, a memorandum, to the effect that he entered it as made because the General Term had reversed the former decree wholly, without limiting the reversal to the probate of the will as a will of real estate, and he, therefore, considered himself precluded from so limiting the

decree. *Held*, that this was immaterial, and in no way affected the decree. *Id.*

5. Where the attestation clause to a will is full and complete, reciting all the facts necessary to a due publication under the statute, it is competent for the court to find that there has been a due publication, although but one of the subscribing witnesses testifies to the essential facts, and the other denies them. *In re Bernsee.* 389

6. In proceedings for the probate of a will which is contested on the ground that there was no due publication of the will, a beneficiary under it is incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication. What occurred at that time is a transaction between the testator and the witness within the meaning of the Code of Civil Procedure (§ 829), although the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witnesses. *Id.*

7. Where an executor and executrix who were legatees under the will executed an instrument stating that their accounts were settled "as between themselves, and as between themselves and said estate," and mutually releasing each other from every liability "by reason of anything relating to the estate or the doings or proceedings of either of them as executrix or executor of said will," *held*, that the release was a bar to proceedings instituted by the executor before the surrogate to compel the executrix to account. Also, that the effect of the instrument as a bar was not affected by the fact that there was an infant interested in the estate; that the release, while it stands, was effectual as a bar under all circumstances as between the executor and executrix. *In re Prugn.* 544

— *As to sufficiency of evidence to sustain decision of Surrogate's Court on settlement of executor's account.*

See In re Bolton (Mem.).

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SUSPENSION OF POWER OF ALIENATION.

The will of B. gave his residuary estate to his executors in trust to divide the net income equally between a daughter-in-law and two cousins of the testator, "the survivor or survivors of them during their natural lives." In case the cousins died before the daughter-in-law "the corpus of said trust estate" was given to the latter; if she died before the cousins it was given to the person or persons she should designate by will. In an action for the construction of the will, *held*, that these provisions did not violate the statute against perpetuities, and were valid, as in no event could the estate be tied up longer than during the lives of the two cousins. *Bird v. Pickford.* 18

TAXES.

See ASSESSMENT AND TAXATION.

TENANT FOR LIFE.

By the will of S. he gave his residuary estate to his wife, "to be used and enjoyed by her" during life or as long as she should remain his widow, the same to be "received and accepted" by her in lieu of dower. The testator left personal estate only, which was converted into money. The executor died and an administrator with the will annexed was appointed, who incurred some expense as such. Upon settlement of the executor's accounts the surrogate decreed that the whole fund should be paid over by the administrator of the executor directly to the widow, who was then a resident of another state, and that she was entitled to the possession thereof without giving security. *Held*, error; that the administrator with the will annexed was entitled to have the money paid over to him, and if he had made any disbursements, or incurred any obligations properly chargeable to the estate, he was entitled to an opportunity of proving this and to a decree for their payment; also, that the will

simply gave to the widow an estate for life or during widowhood, and upon the happening of either event the remaindermen were entitled to the whole *corpus* of the estate; that as the property was not of a kind which must be individually possessed in order to be enjoyed, she was not entitled to possession without giving security. *In re McDougall*. 21

THEFT.

See LARCENY.

TITLE.

1. A sale of land on execution, issued upon a void judgment against the owner, in no way affects his title, and a subsequent conveyance by him is just as effectual as if the judgment had never in form been entered. *McCracken v. Flanagan*. 174
2. So, also, notice to the purchaser, when he took the conveyance, that another claimed title under the sale does not operate as an estoppel against the former. *Id.*
3. The sole effect of the partition of land, by judgment in an action for that purpose, is to give title in severalty where before it was in common, and to settle and establish the title between the parties and their privies; it does not create title as against strangers where none existed before. *Greenleaf v. B., F. & C. I. R. Co.* 395
4. In an action by the vendor to enforce specific performance of a contract for the purchase and sale of land, plaintiff claimed title under a deed with covenant of warranty, which contained conditions substantially as follows: The grantees shall have an equal interest in the property, and shall control and direct the same after the death of the grantor; upon the death of one of the grantees the other to have such control during life; neither "shall have the right to convey by deed" without the consent of the grantor, but it may be arranged to be disposed of by

will by the survivor, or by mutual will of the grantees, to take effect after the death of both. The habendum clause was to the grantees, their "heirs and assigns forever." The grantor was dead at the date of the deed from the grantees to plaintiff. *Held*, that said grantees had power to alien their life estate after the death of their grantor; and so, that their conveyance with warranty conveyed the fee. (1 R. S. 732, 733, §§ 81-84.) *Hume v. Randall*. 499

TRESPASS.

1. In an action to recover rent due under a lease of premises in the city of New York the defense was an eviction. The only act of the lessors upon which the defense was attempted to be supported was the giving to contractors for an excavation upon an adjoining lot a permit to enter on the premises, as required by the Consolidation Act (§ 474, chap. 410, Laws of 1882), in order to subject the party making the excavation to the obligation of protecting the building on the leased premises from injury. *Held*, that in the absence of any reservation in the lease of a right to enter for such a purpose, the permit of the lessors alone was insufficient to give a right of entry to the licensees, but the consent of the lessees was also necessary, and so, if the contractors entered without defendant's consent, for their trespass plaintiffs were not responsible, and the defense was not established. *McKenzie v. Hatton*. 6
2. Defendants, being about to erect a building in the city of New York upon a lot adjoining a store leased and occupied by plaintiffs, which required an excavation below the foundation of plaintiffs' store, entered into a contract with a firm of professional "shorers," by which that firm agreed "to do the shoring, sheath-piling and bridging (as required by law) that is necessary to erect" the building on defendant's lot, and to be responsible for any accident by improperly doing the work. Said firm, as plaintiffs' evidence tended

to show, without their permission and against their protest, entered upon their premises, broke through the walls, inserted needle beams, and occasioned serious damage to their stock of goods. It did not appear that defendants gave any directions to the contractors, advised the entry, or had any knowledge of the circumstances under which the latter entered upon plaintiffs' premises. In an action of trespass the trial court charged that if plaintiffs gave no license to the contractors defendants were liable for the injury. *Held*, error; that defendants had a lawful right to make the excavation, and no duty rested upon them to protect plaintiffs' building save as imposed by the act of 1855 (Chap. 6, Laws of 1855), which requires lot owners in said city proposing to excavate their lots to a depth of more than ten feet to protect, at their own expense, a wall on adjacent premises at or near the boundary line "if afforded the necessary license to enter on the adjoining land and not otherwise;" that the contractors were not authorized by the contract to enter plaintiffs' premises without permission, but were simply employed to discharge the obligation imposed upon defendants by said act, which required consent as a pre-requisite to such entry. *Ketchum v. Newman*. 205

TRIAL.

1. Plaintiffs obtained an attachment against a corporation, which was placed in the hands of defendant, as sheriff, who, by virtue thereof, levied upon certain property of the corporation. A. claimed the property, and pursuant to an agreement between him, a clerk of one of defendant's deputies and plaintiff's attorney, A. gave a check as security for any judgment plaintiffs might recover, and thereupon the property was delivered up to him, and defendant drew the money on the check. A. commenced an action to recover the same, claiming that the property belonged to him and that the check simply took its place; he recovered judgment, which was paid by defendant. Plaintiffs were not made parties; they obtained judgment in the attachment suit, and having failed to collect, brought this action to recover the amount of the judgment. Defendant claimed, on appeal, that he was not liable for the contract made by the deputy's clerk; the authority was not denied but was assumed on the trial. *Held*, that the question could not be raised on appeal. *Blair v. Flack*. 53
2. Defendant further claimed, on appeal, that he was bailee of the check and its proceeds, and that he should have been permitted to show on the trial that the true owner had taken it from him by legal process. No such defense was set up in the answer or alluded to on the trial. *Held*, not available on appeal. *Id*.
3. Where a question put to a witness calls only for proper testimony, but in the course of the answer the witness gives testimony that is improper, the remedy of the party is by motion to strike out the improper testimony, and if he omits, upon the trial, to insist upon his right to have such testimony excluded, its reception is not a ground for reversal; on appeal, an exception to the question is not sufficient. *Holmes v. Roper*. 64
4. In an action by a stock broker to recover a balance alleged to be due from a customer, where an unauthorized sale was claimed, plaintiff proved the service of an account showing the sale as made and a promise of defendant to pay the balance shown to be due, although declaring that he knew plaintiff had violated his contract by making the sale. The court was requested, but refused, to charge that, "to make defendant liable for a ratification of an unlawful sale, it must appear to the satisfaction of the jury that he knew his legal rights." *Held*, no error. *Gillett v. Whiting*. 71
5. Defendant, on cross-examination of plaintiff, for the purpose of discrediting the alleged purchases,

sought to follow through plaintiff's books, not only the transactions in question, but his dealings with other customers. The court allowed this, except as to the names of the other customers. *Held*, that the limitation was within the discretion of the court; that the discretion was reasonably exercised; and so, there was no error. *Id.*

6. Plaintiff's complaint alleged in substance the recovery of judgment by her against one of the defendants and the return of an execution unsatisfied; that after the cause of action accrued, said defendant transferred his property which would be subject to the lien of an execution to his wife, daughter and brother, by instruments set forth; that said transfers were made without consideration and with intent to hinder, delay and defraud the plaintiff. The relief asked was the setting aside of the transfers and the application of the property to the payment of plaintiff's judgment. At the opening of the case on trial, upon defendants' motion, the court dismissed the complaint on the ground that it did not state sufficient facts to constitute a cause of action. *Held*, error; that it was sufficiently favorable to defendants to consider the question as if presented by general demurrer to the complaint, and so considered the complaint set forth facts sufficient to constitute a cause of action. *Kain v. Larkin*. 144

7. In an action for the conversion of certain machinery which had been used by plaintiff for several years before the alleged conversion, plaintiff was permitted to prove, under objection and exception, what the machinery cost when new. Counsel for defendants requested the court to charge that the purchase price was not the true rule of damages or the value of the property; to this the court assented, adding "it is only some evidence as to its value as a new and perfect machine." No motion was made for a nonsuit, or exception taken presenting the question that there was no suffi-

cient evidence of value to sustain a verdict. *Held*, that the question could not be raised upon appeal. *Hawver v. Bell*. 140

8. In an action instituted in 1889 to restrain the operation of an elevated railroad upon a street in the city of New York in front of plaintiff's premises, and to recover damages, the complaint alleged that prior to March, 1887, plaintiff owned an undivided third of the premises as a tenant in common, and that she then acquired by purchase the interests of her cotenants, who also assigned to her their rights of action and claims for damages. Plaintiff claimed for damages sustained prior to March, 1887, as well as since. On the trial defendants moved that the action be severed and that the claim for damages acquired by assignment be sent to a jury; this was denied. *Held*, no error; that if the court decided that the claim for equitable relief was well founded, it was within its discretion to assess all the damages sustained to which plaintiff was entitled, whether belonging to her as owner or acquired by assignment, and that defendants had no absolute right to have them determined by a jury. *Hunter v. Manhattan R. Co.* 281
9. Under a general denial in an action on contract, defendant may controvert by evidence anything which plaintiff is bound to prove in the first instance to make out his cause of action, and anything he is permitted to prove for that purpose. *Milbank v. Jones*. 340
10. When in such an action plaintiff is permitted to prove a cause of action other than that set forth in the complaint, defendant is entitled to the benefit of any defense he may have to the cause of action established. The pleadings will be regarded as amended so as to conform to plaintiff's proof on the one hand and to cover any proof defendant may offer which answers or defeats the case made against him; and so, defendant is entitled to show that the cause of action was satisfied, extended or

modified in such a manner as to defeat any right of action upon it.

Id.

11. Plaintiff's complaint alleged in substance the receipt by defendant of \$5,000 to be held in trust for plaintiff, the trust to be terminated at the election of the latter on or after a day specified; that after that day plaintiff notified defendant of his election to terminate the trust and demanded the money, which defendant refused to pay. The answer was a general denial. Upon the trial plaintiff was permitted to prove an agreement by which defendant acknowledged receipt of the sum specified, which he agreed to return to plaintiff in case a certain resolution of the common council of New York city should not pass and take effect before a day specified. Defendant offered to prove that plaintiff, subsequent to the making of the agreement, extended the time for the passage of the resolution; that it was passed and went into effect on the day specified; that defendant delivered to plaintiff a certified copy thereof, and that the latter accepted it as performance. This was objected to and excluded. *Held*, error. *Id.*

12. Where, on trial at Circuit, a verdict is directed by the court, and exceptions are ordered to be heard in the first instance at General Term, an appeal from the judgment brings up nothing for review except questions presented by the exceptions, and so, where the direction of the verdict is not excepted to, the question as to its propriety may not be considered on the appeal. *Curtis v. W. & W. Mfg. Co.* 511

13. In an action by such a broker to recover commissions, the evidence presented on behalf of plaintiff was to the effect that he went to defendants with L., who was engaged in forming a syndicate to purchase the land; that L. offered, on behalf of the syndicate, to purchase at defendants' price, giving names of those he claimed to be the proposed purchasers, a portion of whom had consented to

join the syndicate, but before the syndicate was fully formed, or the proportion to be paid by each fixed, defendants sold the land to other parties. *Held*, that plaintiff failed to show performance of his contract, and that a refusal to nonsuit was error. *Gerding v. Haskin.* 514

14. It is not error for a trial court to refuse to charge the jury as to the effect upon certain evidence if certain other evidence is believed by them, and to relegate the whole matter to the jury. *Crosby v. Prest., etc., D. & H. C. Co.* 589

15. So also a refusal to charge that the intent of one of the parties to a transaction determines its legal effect, and a charge that the intention with which a thing is done does not always control its legal effect were proper. *Id.*

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. Where the loss of a testamentary trust fund is caused by the waste or misconduct of the executor and trustee, no claim for contribution arises against the residuary legatees. *Mills v. Smith.* 256
2. *It seems*, such legatees are liable to refund in case they have been paid from the estate without a decree authorizing the payment, and in consequence there is a deficiency of assets to discharge prior claims or to pay other legatees, but in the absence of collusion or fraud on their part, they take the payment without other risk. *Id.*
3. By the will of M. a sum was given to his executors to be held in trust for the benefit of T. during life, the trust fund to be invested in bonds and mortgages, and upon his death to be distributed among his children. In an action by the sole surviving child of T., brought after his death, to compel the residuary legatees to account, and to pay the amount of the trust fund, it appeared that there had been a final accounting by the executors, and at that time

the amount of the trust fund was in their hands in bonds and mortgages, which were held by them as the trust fund, and no part thereof was ever paid to the residuary legatees. Neither T. nor plaintiff were cited to appear upon the accounting. By the surrogate's decree thereon, the executors were credited with the amount of the trust fund. *Held*, that in the absence of proof of any fraudulent conversion or combination on the part of the residuary legatees whereby the trust fund was affected or divested, no claim was established against them; that the trust fund having been invested and set apart as prescribed by the will, and the trust being in that condition at the time of the decree, the irregularity in not citing plaintiff and T. did not render the distribution of the residuary estate invalid; that plaintiff's interest was simply in the trust fund, and he had no concern in the distribution of the residue; that for any breach of duty upon the part of the executors and trustees his remedy was against them, not against the distributees. *Id.*

4. In the plaintiff's chain of title, proved in an action to remove a cloud on title, was a deed to three persons, who were described as trustees of a land association. It did not appear that the association was incorporated, or capable as such of taking a legal title. *Held*, it was to be assumed that the association was a partnership of individuals, of which the grantees were members, holding the legal title for the benefit of themselves and others, and so they were not mere trustees, holding simply a nominal title, and the provisions of the Revised Statutes (1 R. S. 728, §§ 49-58), taking away such a title and vesting it in the beneficiary, did not apply; and, therefore, whether the deed was to be regarded as one to the grantees named individually, or as a conveyance for their benefit and that of others, they had authority to sell and convey a good title. *King v. Townsend*. 358

5. While upon the death of one of two co-partners, the successor has

the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and to dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief. *Russell v. McCall*. 437

6. Where the surviving partner has thus misappropriated the assets and an equitable action has been brought against him by the personal representatives of the estate of the deceased partner, and a judgment obtained therein for an accounting and payment of the amount found due the estate, this, unless the amount so found due is paid, is not a bar to an action against others who, by intermeddling with the assets and sharing in the misappropriation, have rendered themselves liable therefor as trustees *de son tort*. Until satisfaction of the judgment it gives the surviving partner no greater rights over the assets than he had before its rendition. *Id.*

UNITED STATES.

1. The United States is to be regarded as a body politic and corporate, and so far as this state is concerned, it is a foreign, not a domestic, corporation. (Code Civ. Pro. § 3343, sub. 18.) *In re Merriam*. 479
2. Under the provision of the Collateral Inheritance Act of 1892 (§ 1, chap. 399, Laws of 1892), which imposes a tax upon the transfer, "by will or intestate law," of any property of the value of \$500, "to persons or corporations not exempt by law from taxation," a bequest to the United States is subject to the tax so imposed. *Id.*

See ACTS OF CONGRESS.

USAGE.

See CUSTOM.

VENDOR AND PURCHASER.

1. A sale of land on execution, issued upon a void judgment against the owner, in no way affects his title, and a subsequent conveyance by him is just as effectual as if the judgment had never in form been entered. *McCracken v. Flanagan.* 174
2. So also notice to the purchaser, when he took the conveyance, that another claimed title under the sale does not operate as an estoppel against the former. *Id.*

WAIVER.

A grantor of land does not waive his equitable lien for unpaid purchase money by taking the promissory note of the grantee therefor, although in taking it he relies upon the solvency and financial ability of the grantee to pay the note, and does not have in contemplation the enforcement of the lien. *Maroney v. Boyle.* 462

— When action of agent of insurance company does not constitute waiver of condition of policy.

See *Moore v. H. F. Ins. Co.* 219

WASTE.

Where the loss of a testamentary trust fund is caused by the waste or misconduct of the executor and trustee, no claim for contribution arises against the residuary legatees. *Mills v. Smith.* 256

WATERCOURSES.

Defendants, under and pursuant to a contract with the city of Brooklyn, laid a conduit on lands belonging to the city. The conduit line crossed a stream which supplied a pond on plaintiff's premises that furnished water power for his mill. In building the conduit across the stream the water

was temporarily diverted. After the work was completed and the bed of the stream restored to its original state, the water passed by underground drainage through the earth into the channel or trench dug for the conduit, and so plaintiff's pond was substantially drained and his water power destroyed. In an action to recover damages, *held*, that defendants were liable for damages sustained by plaintiff caused by the interruption of the flow of the stream during the time they were engaged in constructing the conduit across it; but were not liable for the subsequent injury caused by the conduit; that for this the city, the owner of the land, that directed the construction of the conduit, was alone liable. *Corbett v. Cranford.* 521

WILLS.

1. The will of B. gave his residuary estate to his executors in trust to divide the net income equally between a daughter-in-law and two cousins of the testator, "the survivor or survivors of them during their natural lives." In case the cousins died before the daughter-in-law "the corpus of said trust estate" was given to the latter; if she died before the cousins it was given to the person or persons she should designate by will. In an action for the construction of the will, *held*, that these provisions did not violate the statute against perpetuities, and were valid, as in no event could the estate be tied up longer than during the lives of the two cousins. *Bird v. Pickford.* 18
2. The will of S. gave the use and income of his real estate, one-half to P., the other half to L., during life, but in either case not to exceed twenty years from the testator's death. In case L. died before the expiration of the twenty years the "use and income" of his half, was given "to the eldest male issue * * * then surviving" of T. and A. In case I. survived the twenty years the whole of the real estate was given to him on condition that he pay certain legacies;

if he died before the expiration of the twenty years the real estate was devised to "the eldest male issue" of T. and A. upon the same condition and subject to the interest given to P. His residuary estate the testator gave to his executors upon certain trusts and upon the expiration thereof to beneficiaries named. P. died three years after the testator. I. died thereafter and within the twenty years; at his death T. and A. had no issue living, but thereafter a son was born to them. In an action for the construction of the will, *held*, that as T. and A. had no male issue living at the time of death of I., the devise to their "eldest male issue" lapsed, and the real estate went, not to the heirs of the testator, but into the residuary estate and passed under the residuary clause. *Smith v. Smith.* 29

3. C., a widow, died leaving a son ten years of age her sole heir and next of kin. Her will, after some trifling bequests, contained this clause: "I will and bequeath to John E. Lee all debts, dues and demands of name, nature and kind soever I hold against him and his wife, my trunk and any keepsakes he may wish." The residue of her estate she gave to her son, to be invested by a guardian provided for, and the interest used for the education and support of her son. Mrs. Lee owed to the testatrix \$53 upon a chattel mortgage on "saloon furniture," and \$170 on what was called a chattel lien executed by her on certain horses in her possession and used by her husband as her agent. The testatrix also owned a bond and mortgage of \$1,262 executed by Mrs. Lee on the purchase by her of the land mortgaged; her husband joined in the bond. This land Mrs. Lee had sold previous to the execution of the will, conveying the same by warranty deed clear of incumbrance. The purchaser, however, retained the amount of the bond and mortgage and paid only the balance of the purchase money. This was known to the testatrix when she executed the will. The estate of the testatrix netted for distribution less than \$6,000. After her death, by direction of

Lee, who was the executor of the will, the purchaser of said land handed to Mrs. Lee the part of the purchase money so retained, who at the same time paid it over to the executor and received a discharge of the mortgage. *Held*, that the bequest to Lee did not include said bond and mortgage. *In re Lee.* 58

4. The attestation clause is some proof of the due execution of a will, and where, in addition to it, there is evidence that said clause was read aloud in the hearing of the testator and witnesses, with at least the silent assent of all concerned to its statement of facts, this is sufficient to establish the facts recited. *In re Nelson.* 152
5. A request to sign as a witness, made by the person superintending the execution of a will, in the hearing of the testator, and with his silent permission and approval, is sufficient. *Id.*
6. The attestation clause to a will contained the usual statement that the person who executed the instrument had signed, published and declared it to be his last will and testament; it omitted to recite that the witnesses were requested by the testator to sign the will as such. In proceedings to revoke probate of the will, K., the only surviving witness, denied that the decedent made such a request. K. had been a servant of the deceased for many years, and was disappointed at not finding in the will some legacy for himself; he admitted that B., the other witness, in the presence of the testator, requested him to sign the will, but denied that the decedent in any manner assented, except by silence, and stated that he was apparently inattentive. Declarations of the witness were proved to the effect that when he came into the room the decedent said he wanted him to witness his will. The testator was a lawyer of eminence and ability, who well knew the requirements for its due execution, as did also B., who was also a lawyer, the partner of the decedent. B. drew the will and superintended its execution. K. was

sent for with a view of his becoming a subscribing witness, either by the testator or with his assent. B. read the attestation clause aloud, in the presence of decedent and K. The will was signed by the testator, and both witnesses signed the attestation clause; K. testified that B. then put the will in an envelope and took it away, at the request of the testator, who thereafter recognized it as an existing, executed and completed instrument. B. died more than twelve years thereafter, and thereupon the will in its envelope was delivered to the testator, who opened the package, examined the instrument and receipted for it as his will. *Held*, the evidence was sufficient to justify a finding that the will was duly executed. *Id.*

7. The provision of the Code of Civil Procedure (§ 2622) requiring a surrogate, before admitting a will to probate, to "inquire particularly into all the facts and circumstances," and that he "must be satisfied of the genuineness of the will and the validity of its execution," applies equally to wills of real and of personal property, and the same proof is required as to each upon the questions stated. *In re Bartholick*. 166

8. When, upon presentation for probate of an instrument purporting to be a will of real and personal property, the question as to its genuineness and the validity of its execution is properly presented by a person having the right to raise it in some capacity, it is the right and duty of the surrogate to wholly refuse probate if he becomes satisfied and finds that the testator had not mental capacity to make a will, or that the instrument offered for probate was obtained by fraud and undue influence; he is not required to admit it as a will of personal property, although the only person contesting the probate is interested solely as heir at law, and is not one of the next of kin. *Id.*

9. Where the attestation clause to a will is full and complete, reciting all the facts necessary to a due

publication under the statute, it is competent for the court to find that there has been a due publication, although but one of the subscribing witnesses testifies to the essential facts, and the other denies them. *In re Bernsee*. 389

10. In proceedings for the probate of a will which is contested on the ground that there was no due publication of the will, a beneficiary under it is incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication. What occurred at that time is a transaction between the testator and the witness within the meaning of the Code of Civil Procedure (§ 829), although the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witnesses. *Id.*

11. In determining as to the validity of a foreign will, disposing of personalty, it is immaterial whether the testator was a citizen of the country where the will was executed or of this state; if the former was his domicile at the time of his death its laws will control. *Dammert v. Osborn*. 564

12. The courts of this state may not annul a disposition of personal property in a foreign will, valid by the law of the testator's domicile, and distribute the property to claimants here, contrary to the terms of such disposition. *Id.*

13. *It seems*, when our courts cannot give effect to such a testamentary disposition without violating our laws or public policy, the property should be remitted to the jurisdiction of the domicile. *Id.*

WITNESS.

In proceedings for the probate of a will which is contested on the ground that there was no due publication of the will, a beneficiary under it is incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication. What occurred at that time

is a transaction between the testator and the witness within the meaning of the Code of Civil Procedure (§ 829) although the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witnesses. *In re Bernsee.* 389

YONKERS (CITY OF).

1. In 1848 plaintiff conveyed certain lands to the town of Yonkers, whose rights have since become vested in defendant, the city of Yonkers. The deed contained a condition that the land conveyed should forever remain public and open as a public highway, and that no house, or other erection, save a public monument, should ever be built, erected or permitted thereon. In 1857 the line of the land was located by competent engineers, and defendant H., who owned adjoining lands, erected a building coming up to said line; this was recognized as the true line by the city. H. also constructed an area under the surface of the ground in front of said building, about four feet wide, with a stairway leading down from the street; over this area is a sidewalk with gratings and a door to the stairway, which, when closed, constitute no obstruction. In an action of ejectment to recover possession of the land conveyed, based on the ground of forfeiture of title because of alleged breach of said condition, it was found, upon conflicting evidence, that the build-

ing, which was sixty-three feet in length, encroached at one end sixteen inches, and at the other, two inches upon the land conveyed. Plaintiff saw the building erected, and for more than twenty years made no claim of a breach of said condition. *Held*, that, under the circumstances shown, it did not appear that the city had done, or knowingly permitted anything which amounted to a breach of the condition within any fair and reasonable construction of the condition, or the intention of the parties to the deed when it was executed; also, that no permission to erect the building, such as was contemplated by the parties to the contract, was shown. *Rose v. Hawley.* 386

2. In a former action brought by plaintiff to recover the land granted, a judgment was rendered in his favor; this was reversed by the General Term, and a new trial granted on the law and facts. The order of the General Term was affirmed on appeal to this court, and judgment absolute ordered against plaintiff upon his stipulation on the ground, among others, that no notice had been given to the city of the erection claimed as a breach of the condition. *Held*, that the former judgment was not a bar. *Id.*
3. As to whether plaintiff is bound absolutely by the former judgment because of this stipulation, even in a new action, brought upon new or additional facts subsequently occurring, *quære.* *Id.*

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